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November 25, 2003

The Honorable Mark R. Warner
Members of the General Assembly

Dear Governor Warner and General Assembly Members:

I am pleased to transmit to you this study, prepared in accordance with SJR 354 (2003).

Senate Bill 1279 (2003) calls for the creation of the Virginia Rail Transportation Development Authority. The purpose of this Authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment or infrastructure, upon a determination by the Authority that such action is in the public interest." Senate Joint Resolution 354 requested that the Virginia Department of Rail and Public Transportation "study the Virginia Rail Transportation Development Authority to finance improvements to railroad freight and passenger transportation in Virginia".

At the request of the Department of Rail and Public Transportation, the Virginia Transportation Research Council investigated the enabling legislation (and financial characteristics) of rail authorities in other states in hopes of finding a model for the new rail authority proposed in SB 1279. This survey of authorities in other states showed many ways that a rail authority *could* be structured; however, the authors were unable to discern any straightforward and unambiguous model for the "appropriate" structures and powers of the new authority specified in SJR 354. While the report examines several potential models for the establishment of a Rail Authority, what they would do and how they would be funded, the report does not specifically endorse any of these models.

The authors examine three options for satisfying the needs that were to be fulfilled by creating the new authority: (1) create an independent rail authority, (2) create a new rail agency within the government, or (3) provide the powers needed (such as bonding) to a rail agency that already exists, the Department of Rail and Public Transportation. The Virginia Port Authority (VPA) is an example of a successful authority in Virginia. As the report makes clear, several factors have been essential to the VPA's success, including a dedicated revenue stream and public ownership of the facilities. Because circumstances related to rail are different, it is not possible to simply apply the VPA model to rail.

A range of financial options that could be used by the new authority to mobilize additional capital for investment in rail was discussed. The authors also discuss the different ways that an authority could involve itself in the rail transport sector.

Analysis of rail transport included data provided in the *AASHTO Freight-Rail Bottom Line Report*. Within in these references is data or comments on data analysis provided by Reebie and Associates TRANSEARCH data and U.S. Department of Transportation Freight Analysis Framework Project. Any reference to Reebie and Associates TRANSEARCH are specific to the Bottom Line Report and not associated with other work Reebie and Associates has done for the Department of Rail and Public Transportation.

Finally, the report includes discussion of several constitutional issues related to the establishment of a Rail Authority. A copy has been sent to the Attorney General's office, for their information.

Attached is the report requested in Senate Joint Resolution 354. If you have any questions or need additional information, please let me know.

Sincerely,

Karen J. Rae

Karen J. Rae
Director

Attachments

Cc: Honorable Whittington W. Clement

A STUDY OF THE PROPOSED VIRGINIA RAIL TRANSPORTATION DEVELOPMENT AUTHORITY

A Report to the Governor and General Assembly of Virginia

Virginia Transportation Research Council
November 2003

PREFACE

Senate Bill 1279, passed by Virginia's General Assembly in 2003, calls for the creation of the Virginia Rail Transportation Development Authority. The purpose of this authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment or infrastructure, upon a determination by the Authority that such action is in the public interest." Senate Joint Resolution 354 provides the following argument for creating the new rail authority: (1) appropriate investments in railroad infrastructure will divert passenger and freight traffic from the highways to the railroads; (2) this will reduce the need for highway maintenance and construction and will reduce congestion, promote safety, and make it possible to avoid significant air and water pollution; (3) the railroads in Virginia do not have the financial resources to make the needed investments; and (4) a new rail authority is needed to finance or assist in the financing of the needed investments. SJR 354 also called for a study of the proposed authority; the responsibility for this study was delegated to the Department of Rail and Public Transportation, which in turn asked the Virginia Transportation Research Council to undertake it.

This paper is the result of a team effort to conduct the study. The principal authors are Roger Howe, Jim Gillespie, and Joe Matteo. This team received assistance from Mike Kamprath; Arkopal Goswami; John Miller; Ben Oxley; and Wayne Ferguson, Associate Director for Safety, Planning, and Legal Research at the Virginia Transportation Research Council, who was responsible for leading the study. The team was also assisted by Karen Rae, the Director of the DRPT, Bill LaBaugh, George Conner, and the rest of the staff at DRPT. Chip O'Brien of BB&T Capital Markets in Richmond provided some financial information relating to bonds. The authors also thank the following individuals who took the time to review the report and make comments: Rob Martin of the Federal Rail Administration; Dick Beadles of Virginia High Speed Rail Development Committee; Pierce Homer and Ralph Davis of the Secretary of Transportation's Office; C. W. Moorman, Senior Vice President of Corporate Services at Norfolk Southern.

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LIST OF ABBREVIATIONS AND ACRONYMS

AADT	Average Annual Daily Traffic
AASHTO	American Association of State Highway & Transportation Officials
CMAQ	Congestion Mitigation and Air Quality Improvement Program
CTB	Commonwealth Transportation Board
CTC	Consolidated Transportation Corridor
DOT	Department of Transportation
DRPT	Virginia Department of Rail and Public Transportation
FRA	Federal Railroad Administration
FY	Fiscal Year
HERS	Highway Economic Requirements System
HPMS	Highway Performance Monitoring System
ISTEA	Intermodal Surface Transportation Efficiency Act
MTA	Maryland Transit Administration
NCRRC	North Carolina Railroad Company
ORDC	Ohio Rail Development Commission
SAFETEA	Safe, Accountable, Flexible, and Efficient Transportation Equity Act
SB	Senate Bill
SJR	Senate Joint Resolution
SRA	West Virginia State Rail Authority
TEA-21	Transportation Equity Act for the 21st Century
TTF	Transportation Trust Fund
VDOT	Virginia Department of Transportation
VIT	Virginia International Terminals, Inc.
VMT	Vehicle Miles Traveled
VPA	Virginia Port Authority
VRA	Virginia Resources Authority

EXECUTIVE SUMMARY

Introduction

Senate Bill 1279, passed by the Virginia General Assembly in 2003, calls for the creation of the Virginia Rail Transportation Development Authority. The purpose of this authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment or infrastructure, upon a determination by the authority that such action is in the public interest." Senate Joint Resolution 354 provides the following argument for creating the new rail authority: (1) appropriate investments in railroad infrastructure will divert passenger and freight traffic from the highways to the railroads; (2) this will reduce the need for highway maintenance and construction, and it will reduce congestion, promote safety, and make it possible to avoid significant air and water pollution; (3) the railroads in Virginia do not have the financial resources to make the needed investments; and thus (4) a new rail authority is needed to finance or assist in the financing of the needed investments.

In addition, the bill requests the Virginia Department of Rail and Public Transportation (DRPT) to undertake a study of the proposed Virginia Rail Transportation Development Authority's powers to finance improvements to railroad freight and passenger transportation in Virginia. The DRPT asked the Virginia Transportation Research Council to assist in carrying out this study. This document is the Research Council's report to the DRPT.

In debate and discussion of the bill, Senator John S. Edwards of Roanoke provided the following arguments in its support:

> This bill would create a rail transportation development authority in Virginia to help finance rail lines in Virginia. Mr. President, we all know we must have an intermodal transportation system in Virginia, and a rail component is absolutely essential if we are going to have a 21st Century transportation system.
>
> Unfortunately, in terms of infrastructure and the capital, the railroads don't have the money, the state doesn't have the money, and the federal government is not giving us any money to do this, so we need to create an authority which can issue bonds to be paid for with the surcharge on the freight (for example) to upgrade the rail lines. There is a great need to upgrade the rail-lines parallel to I-81 in order to shift some of the truck traffic to trains. There is a great need to upgrade the rail lines for high-speed rail. There is a great need to upgrade the rail lines for the TransDominion Express, and I am sure there are other needs as well.
>
> So this would give us an opportunity to provide the capital improvements that are so essential to upgrading the rail lines.

Scope

SJR 354 specified the scope of the study in the following way:

(i) analyze the feasibility of various options to finance improvements to railroad freight and passenger transportation in Virginia, including strategies that may be considered by the Virginia Rail Transportation Development Authority, pursuant to SB 1279 (2003);

(ii) conduct a literature search of national best practices relative to creating rail authorities and other relevant issues;

(iii) examine how the Virginia Rail Transportation Development Authority can finance and facilitate financing of the acquisition, construction, repair, improvement, and extension of rail facilities, including rolling stock and infrastructure that the Authority determines to be in the public interest; and

(iv) recommend the appropriate structure, powers and duties of the Authority, and revenue and sources of revenue needed to perform its responsibilities.

Methodology

To achieve the study objectives of addressing the four tasks specified in SJR 354, the study team did the following:

The environment in which the proposed new Virginia rail authority would function was examined. A discussion of the state of freight rail today is presented. This discussion shows how important the maintenance of a healthy rail system is to the highway network. It also shows the environment in which the new rail authority would operate.

A survey of the Virginia Port Authority (VPA), the DRPT, the Virginia Resources Authority (VRA), and 11 rail entities in other states was conducted. In this response to Task 2, the research team examined the entities in other states that most resembled the proposed Virginia Rail Transportation Development Authority either in its goals or in its structure. A variety of sources were examined, but the emphasis was on the enabling legislation. It was felt that the structure of the entities as well as their powers would most clearly be revealed by examining the enabling legislation that created them. Annual reports and other financial statements as well as published articles were examined. In a few cases, a telephone interview was conducted to gain more information about the actual operation of the authority. The research team also examined the enabling legislation of the DRPT, the VPA, and the VRA. Again, it was felt that the enabling legislation would reveal a great deal about the structure and powers of each of these organizations. Information about the finances and operations of these organizations was also gathered.

Financial issues concerning the new authority were examined. Tasks 1 and 3 are so closely related that the research team decided to address them jointly by investigating the following questions:

- How can an organ of the Commonwealth mobilize additional capital for investment in rail transport?
- How can an organ of the Commonwealth participate in the rail transport sector?
- What institutional structure would best suit a Commonwealth organ whose purpose is to mobilize capital for rail investment?

- What other policy initiatives of the Commonwealth might indirectly affect the purposes envisioned for the Virginia Rail Transportation Development Authority?

Three options regarding the creation of the new authority were examined. In response to the request in Task 4 for recommendations as to the appropriate structure, powers, and duties of the proposed authority, as well as sources of revenue, the research team examined three important options regarding the creation of the authority. The team applied the insights derived from the investigations undertaken in response to Tasks 1, 2, and 3 in an attempt to make clear the pros and cons of each. These options included:

- Option 1: Create an independent rail authority with bonding powers.
- Option 2: Create a new rail agency within the government with bonding powers.
- Option 3: Do not create a new authority or a new agency: Give bonding powers to the DRPT.

Finally, the possibility that the proposed rail authority with its intended purpose would violate Article 10, Section 10, of the Constitution of Virginia was examined.

The Freight Rail Environment Today

Before presenting the results for each of the tasks specified in SJR 354, the report briefly describes the state of (primarily) the rail freight industry today. Intercity passenger rail is not discussed in any detail not because it is not important in its own right, but because, at the present time, it represents a very small fraction of intercity rail activity and a very small component of intercity passenger movement. Also, a large part of the focus here is on the needed improvements to the rail infrastructure, and intercity passenger service and intercity freight service share the same infrastructure. The vast majority of intercity rail is freight rail. That notwithstanding, part of the problem is that there still is not enough of it. Its viability as a shipping mode is hindered, in part, by the constraints placed on it by aging and inadequate infrastructure. Improvements in rail infrastructure are likely to have beneficial societal consequences in other areas of transportation—such as the reduction of congestion on the highways, reduced pollution, etc. This section of the report attempts to show the environment in which the rail authority proposed by SB 1279 will function. The focus here is on the importance of rail for other modes of transportation and for the economy, the problems associated with the railroads' inadequate infrastructure, and the need for capital to upgrade the infrastructure.

Virginia lies in a strategic corridor of national significance. The transportation network in the Mid-Atlantic region serves and connects the nation's political capital, its financial capital, and 47 million people (if the New York City metropolitan area is included). The Mid-Atlantic is the gateway to New York State and New England. All together, the states of the Mid-Atlantic region account for a quarter of the nation's population and a quarter of its jobs.

The Mid-Atlantic region is facing a transportation capacity crisis. Its transportation network is severely congested. There are problems with all of the different modes of transportation; however, the most significant problems are on its highways. The FHWA's 1999

Highway Performance Monitoring System (HPMS) data show that I-95 is one of the nation's preeminent freight corridors. It carries more than 10,000 trucks a day. Trucks represent 10 to 20 percent of all vehicles on I-95. Although I-81 carries fewer trucks than I-95, they represent an even higher share of total vehicle traffic on the highway: 20 to 30 percent on a daily basis with peak period volumes of up to 60 percent (VDOT statistics). I-81 carries about the same tonnage as I-95 because it has a higher share of long haul, freight-truck traffic. The FHWA's Freight Analysis Framework Project estimates that the tonnage of truck and rail freight moving in the region may increase by 70 to 80 percent by 2020. The HPMS projections show significant increases in total average annual daily traffic on I-95 and I-81 by 2020. These increases range from 10 percent on low-growth segments to 196 percent on high-growth segments. Level-of-service measures show that many segments of I-95 and I-81 are already at or near capacity.

The extensive rail network in the Mid-Atlantic is not operating at its full potential. Many segments of the system are capable of handling higher volumes of passenger and freight traffic, but these volumes cannot be accommodated because of critical choke points in the rail system. Choke points are physical points in the rail system (bridges, tunnels, track segments) that have reduced capacity and operational capabilities in comparison to the rest of the system. Deficient information and management systems that constrain the effective utilization of the system as a whole are also considered choke points. The most critical choke points must be eliminated to unlock the full capacity of the rail network in the Mid-Atlantic and in Virginia. The critical types of choke points throughout the Mid-Atlantic—including Virginia—are:

- Antiquated and undersized bridges and tunnels.
- Lack of capacity on critical segments of freight and passenger lines.
- Inadequate vertical clearances for double-stack container traffic on freight mainlines.
- Inadequate connections between rail lines.
- Congested grade crossings, stations, and terminals.
- Outmoded and inadequate information and control systems.

Eliminating choke points will benefit Norfolk Southern and CSX by making it possible for them to improve freight service and attract new business. There are also significant public benefits:

- Increased freight capacity, helping offset the need to run more trucks on congested highways.
- Upgraded service for double-stack intermodal container traffic and better access to international seaports.
- More freight service at competitive rates for shippers and receivers.
- Enhanced safety, reliability, and emergency response.
- Greater ability to help the nation's freight transportation network recover from service disruptions.
- Improved capability to support military mobilization.
- Reduced pollution.

Improving the rail freight network also helps address congestion on the Mid-Atlantic region's highway system. Trucking is—and will remain—the principal mode of transportation

for freight because of its flexibility and cost, particularly for high-value, time-sensitive freight and shorter distance moves. For longer distance intermodal shipments and for bulk commodities, rail is highly competitive. Although it is impossible to say for sure how the improvements in rail infrastructure in will ultimately affect the railroads, the following general effects are anticipated:

- *Elimination of choke points would support the railroads in maintaining and growing their existing core business of hauling bulk commodities and intermodal freight.* According to Reebie's TRANSEARCH data for 2000, the Mid-Atlantic rail system handles more than 386 million tons of freight annually (mostly bulk freight moving east-west), which is equivalent to 82,000 truck trips per day. At growth forecast at 79 percent, rail would add another 300 million tons by 2020, the equivalent of more than 60,000 truck trips per day. If the rail system cannot handle this growth, the highway system must handle it.

- *The additional rail capacity brought about by the removal of choke points would benefit drivers and truckers using the key long-haul trucking corridors such as I-81, I-95, and I-78.* The Mid-Atlantic states are more dependent on long-haul trucking (moves longer than 500 miles) than the nation as a whole. If the choke points were eliminated, thereby enabling the freight railroads to offer more competitive levels of service and making it possible for the region to lower its reliance on long-haul trucking, approximately 25 percent of long-haul traffic could divert to rail intermodal. If only new truck traffic between 2000 and 2020 is considered, leaving existing truck traffic in place, this would amount to about 12,000 trucks per day that could be diverted to rail.

Financial Issues: Tasks 1 and 3 Results

The research team responded to Tasks 1 and 3 by answering the following four questions:

1. How can an organ of the Commonwealth mobilize capital for investment in rail transport? The following means were found:

- *Private money* (loan guarantees).
- *Federal money* (Congestion Mitigation and Air Quality Improvement funds and other federal rail assistance programs).
- *State and local money* (appropriations from general revenue, dedicated source of tax revenue, user fees, bonds).

The general pattern, evident from a survey of the available sources of capital, is that typically only by harnessing state funds can a rail investment program expect to create a significant impact on rail transport. The survey of rail authorities in other states generally bears this out. Although these authorities may obtain a federal grant now and again, or broker a deal with a private investor, state money is their dominant and most dependable source.

2. How can an organ of the Commonwealth participate in the rail transport sector? The following means were found:

- Loan guarantees.
- Grants.
- Direct subsidies.
- *Quid pro quo* with railroad companies.
- Purchase and operation of track and facilities.

The Virginia General Assembly will almost certainly have to front some money to cover the administrative expenses of any agency it creates. The pattern apparent in the answers to the first question suggests that the General Assembly will most likely have to make a continuing commitment of resources. The administrative costs of many of the state rail agencies that were surveyed fell within a fairly narrow range of $500,000 to $1 million. However, if the budget and staff of the rail section of the DRPT were transferred to the new authority, then the expenditure would be incrementally reduced. The current administrative and operational expenditures for the DRPT are presented in Appendix C.

3. What institutional structure would best suit a Commonwealth organ the purpose of which is to mobilize capital for rail investment? To infer what institutional structure is best suited to a rail authority of the sort proposed, it would seem that the best approach would be to examine the performance of the rail authorities in other states, and also to examine the functioning of the DRPT, the VPA, and the VRA, all of which carry some similar responsibilities in other transport or utility sectors. To evaluate or compare the effectiveness of the various institutional structures that exist in Virginia and in other states is not straightforward, however. The publicly stated mission varies from one rail authority to another. The financial and operating information that is available in public documents varies from one authority to another. In some cases, for example that of Florida, the rail authority's administrative staff cost is borne by the state DOT. Despite the difficulties, it is possible to make some generalizations about what works. One apparently favorable institutional feature is a narrow programmatic focus, and another is some degree of political and financial independence.

4. What other policy initiatives of the Commonwealth may indirectly affect the purposes envisioned for the Virginia Rail Transportation Development Authority? Other policy initiatives that are either under way or under discussion in Virginia could promote indirectly the objectives that a rail authority might pursue. Among the initiatives that could have a substantial effect are changes in the highway user fee structure; the construction or expansion of intermodal freight terminals in or near Virginia; and the quantity of investment in complementary transport modes, such as port facilities, or in competing transport modes, especially highways. None of these initiatives would directly attract investment to rail transport; however, they would affect the quantity of freight that shippers want to move, and they would influence shippers' choice between trains and trucks.

Survey of Rail Entities in Virginia and in Other States: Task 2 Results

Overview

The VPA, the DRPT, the VRA, and 11 rail entities in other states were investigated by the research team. The entities in other states can be loosely grouped into the following four categories:

Group 1: Authorities created to plan overall rail strategy and to buy/operate/improve/lease rail lines to preserve and expand service: Maryland, New York Southern Tier, Ohio, Pennsylvania, South Dakota, and West Virginia.

Group 2: Dedicated to freight; constructed their own line: Alameda Corridor.

Group 3: High-speed rail projects: California High-Speed Rail and Florida High-Speed Rail.

Group 4: Lines owned by an independent entity, which receives help from the state and which focuses on attracting new business and increasing revenues: Alaska and North Carolina.

It would certainly be fair to say that one of the research team's findings is that there is no standard template or form on which to model an authority. The authorities are as varied as their purposes. It is interesting to see that the idiosyncrasies of a particular authority are a product of the effort to 'design' the authority in such a way that it will successfully achieve its goals in the environment in which it finds itself. And this, of course, includes the political environment.

Common Features

However, there were common features. The common features listed are not characteristic of all of the authorities. At least many of them are not. However, they appear often enough in the authorities investigated to warrant their appearance here.

Legal Status. Many public authorities are political subdivisions of the state, tax-exempt, and exempt from many state laws (i.e. laws governing procurement procedures).

Powers/Duties. Many public authorities**:**

- May create procedures for the hiring of employees and outside consultants.
- May engage in long-term planning.
- May make use of studies by state agencies.
- May issue bonds not backed by the full faith and credit of their respective states.
- May acquire and dispose of land.
- May construct, maintain, and repair rail lines and rail equipment.

- May apply for and receive grants from the federal government.

Executive Director/Employees. Many public authorities:

- Require that the board of directors name an executive director.
- Empower that executive director to run day-to-day operations of the authority.
- Provide that major decisions (i.e. selling of assets, acquiring debt) require the approval of the board (and oftentimes the state legislature).

Board of Directors. Many public authorities:

- Have a board to provide oversight to the authority's activities.
- Have a procedure specifying who shall name members to the board and how those members are to be named (by specifying criteria for naming board members such as by geographic region, area of expertise, etc.).
- Have voting procedures, term lengths, and compensation levels set by their enabling legislation.
- Require that the board issue an annual report.
- Cede day-to-day control to an executive director.

Options and Alternatives for the Virginia Rail Transportation Development Authority: Task 4 Results

The fourth task specified in SJR 354 is to "recommend the appropriate structure, powers, and duties of the Authority, and revenue and sources of revenue needed to perform its responsibilities."

Insights from the Survey of States

It was hoped that the survey of rail authorities in other states would provide ample support for recommendations as to the "appropriate structure, powers, and duties" of the authority; however, the survey did not turn up anything that unambiguously points to specific "appropriate" structures, powers, or duties for an authority.

The survey results are replete with ideas about the way an authority could be structured; however, one would be hard-pressed to derive a general rule about the "appropriate" structure of a rail authority from the results of this survey. The rail authorities that were investigated have a variety of goals and a variety of organizational structures designed to make it possible to meet the goals. All of them have to try to succeed in the political, economic, and social environment in which they exist.

Revenues and Financial Powers

The research team has assumed that bonding powers are critical to the success of the new authority in achieving such goals as have been proposed for it. The full range of duties that may eventually fall within the province of this new authority are not fully spelled out in Senate Bill 1279; however, the bill is clear about at least one of the principal purposes of the authority: The authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth . . . ." The power to issue bonds would allow the new authority to have a greater impact in carrying out this purpose in a shorter period of time. A discussion of the available sources of revenue appears in the previous section.

The Virginia Port Authority as a Model of an Independent Authority

Questions about the appropriate structure and powers of the new rail authority are affected by the question whether it is to be independent in the way that the VPA is. Is it to be set up as autonomous and function like a business, or is it to be created as a government agency? The new rail authority's independence would be created in the enabling legislation along with the structure and powers appropriate to an organization that is to be largely independent of government control. If the rail authority were independent, this would also affect the range of possible sources of revenue.

The research team feels that the history of the emergence of the VPA from government control is instructive and directly relevant to questions concerning the "appropriate" structure, powers, and duties of the proposed rail authority. One of the most significant aspects of the history of the VPA is that its progressively increasing independence from government control and the unification of the ports are seen as the most important factors in its success. These aspects of the VPA's success are relevant to the question whether it should serve as a model for the new rail authority. (The reader should bear in mind that the word independent is used here to mean independent in the way that VPA is independent from the government.) The director of the VPA emphasized that "if you're going to do what we do, then you need to be a business, not a political organization."

This puts the emphasis squarely on the question whether the Virginia Rail Transportation Development Authority's operations are going to be sufficiently similar to those of the VPA that it needs to be independent of the government and needs to function like a "business" rather than a "political organization." If, in order to achieve its goals, it needs to function like a business, then the history of the VPA is instructive. Taking the VPA as a model could be instrumental in setting the new authority on the right path from the beginning.

So, in thinking about "appropriate" structures, powers, and duties of the proposed rail authority, it would be reasonable to suggest that the VPA provides at the very least a model for some general characteristics: It is autonomous/independent; it functions as a business rather than a government agency and has a businesslike structure and organization; it has the power to issue revenue bonds (but it must have the approval of the General Assembly); it has the power to

create corporations to carry out some of its functions; it has the power to purchase property, to set prices for services, to use its income for VPA purposes, and to promote the services of the VPA and to solicit new customers.

It would be reasonable to assume that the proposed rail authority would benefit from a similar array of powers and from having an independent status; however, it must be said that the new rail authority could be sufficiently different from the VPA that reasonable doubts could be raised about the need to make it an independent authority. One difference is that the VPA owns all of its facilities. The VPA's customers want to use its facilities, and they are willing to pay for that privilege. This, of course, provides the VPA with a significant source of income. If the rail authority, on the other hand, did not own the infrastructure, it would not be able to charge fees for its use. The plan, described earlier, is to place a surcharge on the freight. However, if the VPA model were accepted as appropriate, then owning the infrastructure would be a desirable goal for the new rail authority. In that case, the authority would have something that customers would want to use, and this would provide the authority with a source of income (as well as, of course, the expenses associated with owning the infrastructure).

Part of the problem with using the VPA as a model is that it is not entirely clear just how significant its "autonomy" is in its success. Clearly, it is one of the most important factors in its success. The skills of its director have contributed to its success. Certainly, one of the most important factors in the success of the VPA has been its success in attracting distribution centers to the immediate vicinity of the ports. Another important factor in VPA's success was the unification of the ports, which gave the VPA considerably more control over the operations of the ports. Again, there is nothing in the rail authority's world that would parallel unification—unless, that is, the authority were to buy the rail infrastructure.

Model of an Agency within the Government

However, the VPA is not the only model that needs to be considered. The research team came across an interesting example of a rail organization, the Ohio Rail Development Commission, that performs many of the functions that the new rail authority would be expected to perform—but from within the government.

Members of the research team spoke with the director of the commission by telephone. One of the most interesting aspects of the conversation was the fact that he thought that it was important not to separate oneself from the government. He knew of the VPA and its successes, and he was aware that it functioned for the most part independently of the government, but he described a wide array of projects and successes that the commission has had, which were achieved without separation from the government. He suggested that it was important to jump right into the political fray of state government. For him, this is where the work takes place.

Another Alternative: Provide the DRPT with Bonding Powers

The successes of the ORDC suggest an alternative to the establishment of a new rail authority: Provide bonding powers to a state rail organization that already exists—the DRPT.

Although providing bonding powers to the DRPT would be unique in contemporary state government in Virginia (no other state agency has debt authority), it would not be unconstitutional. Normally, all bonding is performed by independent or quasi-independent boards or authorities, such as the Commonwealth Transportation Board or the VRA (which, by the way, is currently authorized to issue debt for heavy rail projects). To maintain the clarity of the distinctions among the three options provided, the option that will be contrasted with the option of creating a new and independent authority in the following summary will be the option of providing the DRPT with bonding powers—even though the bonds the DRPT asks to be issued may in fact be issued by the CTB. What is important is that the DRPT would be determining what bonds needed to be issued.

A Summary of the Three Options for Creating the Authority

The first decision that has to be made is whether to create an independent rail authority or a rail agency within the government. If it is decided to create a rail agency *within* the government, then it must be decided whether the creation of a new agency would be more appropriate than providing bonding powers to the DRPT. It is the position of the research team that the creation of a separate rail agency within the government is not a strong option because the DRPT already exists as a rail agency within the government. So, to a large extent, the research team sees the choice as one between the creation of an independent authority and the provision of bonding powers (and perhaps other needed powers) to the DRPT. Nevertheless, arguments in favor of the creation of a rail agency within the government that is separate from the DRPT are also provided.

The reader should bear in mind that the arguments presented in support of the creation of an independent rail authority also include arguments for and against the separation of rail from the DRPT. Likewise, the arguments in favor of the creation of a rail agency *within* the government are principally arrayed for and against its separation from the DRPT and the limitation of its focus solely to rail. Here are a few arguments in favor of and against each of the three options presented.

Option 1: Create an Independent Rail Authority with Bonding Powers

Pros

- It would have wider financial and operational prerogatives.
- Maximum flexibility and freedom of action.

- Freedom from restrictions imposed by the "rigid governmental way of doing things."
- It was once said of the VPA that if it were properly funded and operated as an autonomous businesslike organization, it "could return economic benefits to the citizens of Virginia." This may also be true of an independent rail authority.
- It would have the right to gain and use proprietary information and prohibit its disclosure.
- The authority would have the right to create corporations to carry out some of its functions. (This would make it possible to negotiate with organized labor, which would be important in dealing with railroads.)
- Would unify all rail efforts under the control of one organization.
- A unified authority would allow for comprehensive planning, priority setting, and coordinated repairs.
- The authority would be focused strictly on rail matters.
- The authority would provide an independent voice for rail transportation development.
- There is some evidence from the examination of authorities in other states that this narrow programmatic focus may enhance the efficiency of the organization.
- An independent authority would be less affected by political changes.

Cons

- Increased state expenditures as a result of the costs of setting up and maintaining a separate authority. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new authority would likely be between $500 thousand and $1 million a year. (This assumes that the rail section of the DRPT would remain in existence as a part of the DRPT. If, on the other hand, the rail section of the DRPT were moved to the new authority, then the extra costs of operating the new authority would be the difference between the costs of operating the rail section of the DRPT and the costs of operating the new authority.)
- Possible inefficiencies (i.e., other existing agencies such as the DRPT might be able to perform this task at lower cost and in a more efficient way by virtue of previous experience). By not using an existing organization that is familiar with rail, will lose at least some of its institutional experience.
- Unlike the VPA, the new rail authority might not own the rail facilities; as a consequence, it would not be able to generate revenue by charging for the use of the rail lines as VPA does for use of the port facilities.
- Unifying all rail matters under one authority may not have the importance that it had for the VPA, unless the intention is for the new authority to own the railroad infrastructure.
- Adds new agency; creates more bureaucracy.
- Diminishes the voice of the DRPT, which sees itself as the voice of alternative transportation, as a result of the fact that the DRPT would lose the railroad community, which is a key constituency.
- Would aggravate the competition between rail and transit for funds.
- The new authority will be focused solely on rail; consequently, it will lose the benefits of being part of the larger rail and public transportation community.

Option 2: Create a New Rail Agency Within the Government with Bonding Powers

Pros

- Would unify all rail efforts under the control of one organization.
- A unified agency would allow for comprehensive planning, priority setting, and coordinated repairs.
- The agency would be focused strictly on rail matters.
- The agency would provide an independent voice for rail transportation development.
- There is some evidence from the examination of authorities in other states that this narrow programmatic focus may enhance the efficiency of the organization.

Cons

- The cost of setting up and maintaining the new agency will be much greater than if the power to issue bonds is given to the DRPT. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new agency would likely be between $500 thousand and $1 million a year. (Again, this would only be true as long as the rail section of the DRPT remained in operation and remained a part of the DRPT.)
- The DRPT already exists, so there would be no time lag as there would be if a new authority were being set up.
- The DRPT already has expertise in state rail matters.
- Possible inefficiencies (i.e., other existing agencies such as the DRPT might be able to perform this task at lower cost and in a more efficient way by virtue of previous experience). By not using an existing organization that is familiar with rail, will lose at least some of its institutional experience.
- Adds new agency; creates more bureaucracy.
- Diminishes the voice of the DRPT, which sees itself as the voice of alternative transportation, as a result of the fact that the DRPT would lose the railroad community, which is a key constituency.
- Would aggravate the competition between rail and transit for funds.
- The new authority will be focused solely on rail; consequently, it will lose the benefits of being part of the larger rail and public transportation community.

Option 3: Do Not Create a New Authority or a New Agency: Give Bonding Powers to the DRPT

Pros

- The cost of setting up and maintaining the new authority will be much greater than if the power to issue bonds is given to the DRPT. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new authority would likely be between $500 thousand and $1 million a year. (Again, this would be true as long

as the rail section of the DRPT remained in operation and remained a part of the DRPT.)
- The DRPT already exists, so there would be no time lag as there would be if a new authority were being set up.
- The DRPT has regular dealings with the railroads and an understanding of their respective positions, which would facilitate negotiations with them.
- The DRPT already has expertise in state rail matters.
- The DRPT has a good working relationship with national groups.
- The DRPT currently has the authority to withhold proprietary information from distribution.
- Current staff has a working relationship with the Federal Rail Administration and understands legislative programs and funding.
- Would unify all rail efforts under the control of one organization.

Cons

- The DRPT does not have certain negotiating rights, such as the ability to negotiate with unions; however, it can (and currently does) negotiate with railroads.
- Constrained by government administrative procedures.
- Would not have the wider financial and operational prerogatives that an independent agency would have.
- Would not have the right to create corporations to carry out some of its functions.
- Would be more affected by political changes.

The Constitutional Question

The wording of Article 10, Section 10, of the Constitution of Virginia seems to suggest that the creation of the Virginia Rail Transportation Development Authority to serve its intended purposes would be unconstitutional:

> Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

A University of Virginia law student on the staff of the Virginia Transportation Research Council has looked into this issue and has concluded that it would probably be acceptable to proceed with an authority devoted to financing or helping finance infrastructure improvements. (A legal memorandum on this issue is included as Appendix D.)

CSX CORPORATION

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Robert W. Shinn
Vice President and
Executive Assistant to the Chairman

December 15, 2003

Ms. Karen J. Rae
Director
Virginia Department of Rail and Public Transportation
P.O. Box 590
Richmond, Virginia 23218-0590

Dear Director Rae:

Thank you for the opportunity to comment on the creation of a rail authority in Virginia. Our view of the issue is principally from two perspectives: (1) is there a current need, and (2) what is the potential funding mechanism for the projects.

Our starting point is trying to determine what the new entity would do that VDRPT isn't already either doing, or capable of doing. Our view is that VDRPT has done an outstanding job working with various constituencies involved in freight and commuter rail issues and has helped facilitate contracts, solve problems, and work together on a variety of infrastructure related projects. Recent examples include working together on VRE contract issues, modeling and producing a MOU regarding new infrastructure and trains for VRE, help following Hurricane Isabel, and bringing constituencies together to work on issues related to last year's storms and flooding that impacted passenger service. In our view, VDRPT has a high quality and professional staff that is performing their role in a high-quality manner.

Of course the big question related to need is what would an authority do that isn't currently being performed by VDRPT. The most frequent justifications relate to independent bonding authority, purchasing physical assets, and being exempt from statutory provisions such as procurement guidelines. While we are not opposed to the concept of a rail authority in principle, these functions could be achieved by VDRPT with legislative changes to the current Code of Virginia.

It's also clear that other Virginia agencies do many of the things the authority would be trying to accomplish. For example, VDOT manages and oversees hundreds of projects that require long-term financing and have varying degrees of complexity. In fact, VDRPT's oversight of the Dulles project suggests that they have existing authority to manage large-scale projects.

This leads to the second important issue: the funding mechanism. Successful authorities both in Virginia and across the nation generally have a natural stream of income that sustains the operation and could pay debt service. The Virginia Port

Authority (VPA), for example, has private beneficiaries, the steamship companies, that benefit from VPA's direct activities and are willing to pay for those services. Similarly, private airlines need runways, airport terminals, and air traffic control systems to operate efficiently. It's natural that they would pay for those services.

Freight railroads, in contrast, operate on almost entirely private rights-of-way. We own the property and pay hundreds of millions of dollars per year for capital costs to maintain and build our infrastructure. We would only be interested in creative financial arrangements on a specific case-by-case basis. There may be instances in the future that we will want to enter into an arrangement with Virginia, similar to the Shellpot Bridge arrangement between NS and Delaware, whereby the state pays for a project and is reimbursed on a per-car basis. There are many variations on this concept, but the key variable is that the funding stream comes *voluntarily* from the railroads. I'm not sure whether VDRPT already has the ability to enter into this type of arrangement, but my sense is that modifications to the code could give them this authority.

The major concern for CSX is that the freight railroads could be seen as a potential *involuntary* source of funding in the future. None of the current supporters of the authority have mentioned this, and from conversations with some of them it's clear that this is not the intent. However, a statement in any proposed legislation that clarifies that freight railroads will not fund any part of the authority's activities, except when they voluntarily enter into a contract for a specific purpose, would help address this concern.

In short, prior to the creation of the authority, the key question that needs to be answered is whether the existing VDRPT can perform the needed functions to accomplish the goals the authority is trying to address. Our experience with VDRPT has been positive and we shouldn't create another entity to do the work that an existing one may be able to achieve.

With best regards,

Sincerely,

Robert W. Shinn

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C. W. Moorman
Sr. Vice President - Corpora

VIA facsimile (434.293.1990)

November 12, 2003

Mr. Roger Howe
Public Relations & Marketing Specialist III
Virginia Transportation Research Council
530 Edgemount Road
Charlottesville, VA 22903

Subject: Norfolk Southern Response to the Review Draft of
A Study of the Proposed Virginia Rail Transportation Development Authority (Authority)

Dear Mr. Howe:

Norfolk Southern has reviewed the October 2003 draft of the above-captioned report and offers the following summary and general comments and then addresses each of the four study scopes (2, 1&3, and 4 as presented in the report) in turn.

Summary Comments: NS believes that the overriding purpose of the Authority should be to attract private capital into the rail industry that would not otherwise occur. The private capital then mixes with public capital to provide a balanced investment and risk sharing approach to addressing the Commonwealth's transportation challenges.

The primary question to ask when weighing the three options for the Authority's structure is: "Will this attract private capital?" Moreover, the private capital referenced is not capital already in the rail industry, which is already in the investment mix. The target is capital completely outside the transportation industry today which needs to be drawn into this arena. If the Authority "vehicle" fails in this test of capital attraction, another format or statutory structure should be devised.

Accordingly, NS believes that the study team should consult with the investment community on how best to structure the Authority to reach this goal. Its answer should weigh heavily in deciding the Authority's ultimate configuration.

General Comments: The report accurately notes the gap between the railroad industry's return on investment and the cost of capital (page 11). The discussion shows a solid understanding of the challenges the industry faces regarding infrastructure improvements and rolling stock acquisition and its restricted ability to finance them. NS concurs with

the report's assumption that rail will play an increasing role in mitigating highway congestion. The need for innovative off balance sheet financing to fund such investment emphasizes the potential importance of public private partnerships (PPP). A variety of funding mechanisms will be required and a state rail authority with bonding powers that complement available federal programs may provide the apparatus to address the Commonwealth's transportation challenges.

The report also does a commendable job of detailing the benefits of rail investment to the driving public, highway budgets and shippers and, conversely, the grim outlook to all if future rail infrastructure needs are not met.

Study Task 2. *Conduct a literature search of national best practices.*

The review of the 11 rail authorities in other states and the three authorities in Virginia (page 18) is comprehensive. NS agrees with the motivation to focus on authorities that possess bonding powers. Of the four distinct groups of authorities reviewed, an Authority patterned after Group 1 (those created to plan overall strategy and to buy/operate/improve/lease rail lines to preserve and expand service) typifies what NS has found to be the most effective approach. NS believes that creating a highly specialized Authority (such as one dedicated entirely to high-speed rail) will be too narrowly focused to succeed.

Study Tasks 1 & 3. *Analyze the feasibility of various finance options and examine how the Authority can finance and facilitate financing acquisitions, infrastructure improvements and rolling stock.*

NS agrees with the conclusion that private railroads will not be inclined to take on more debt to fund PPP projects even if that funding is guaranteed with the full faith and credit of the Commonwealth (page 36). This avenue would generate little, if any, project capital. NS also agrees that traditional sources of state and local money (general appropriations and dedicated sources of tax revenue) have not addressed PPP-related rail infrastructure needs in the past, nor will they in the future. Careful use of user fees (and bonds supported by user fees) supplemented by available Federal loan and grant programs appear preferable (page 37). Two cautionary notes:

1) User fees only should be assessed on traffic benefiting from the infrastructure improvements, e.g. traffic diverted from highway to rail as a result of a PPP project. Existing traffic should not be burdened with improvement-related fees or it likely will return to the highway.

2) There must be awareness that traffic can handle only so many tolls from origin to destination if rail economics are to prevail over highway use.

Quid pro quo rail deals with railroad companies (page 39), such as public funding of rail infrastructure in exchange for passenger or commuter operating rights over the improved corridor are an option as long as the railroad's freight operations are not hampered and its

capacity to handle new traffic is enhanced. These applications, while limited, are worth exploring.

Study Task 4: *Recommend the appropriate structure, powers and duties of the Authority.*

Regarding institutional structures that work, NS believes that the Virginia Port Authority (VPA) is an excellent model. The success of the VPA reflects its political and financial independence. However, the VPA's mission narrowly focuses on development of the port. NS believes that a rail authority would have a broader mission to develop freight, passenger and commuter rail throughout the Commonwealth. Establishing separate authorities for each constituency would be restrictive as the three are increasingly intertwined. Historically, however, passenger issues tend to upstage freight needs in most public policy arenas, so it is imperative that the structure chosen offers a balance between passenger and freight.

As discussed above, a separate authority will ensure the flexibility to better respond to the needs of the marketplace. Additionally, an independent agency would allow for critically important business representation on the Board.

The report (page 53) discusses the Ohio Rail Development Commission (ORDC) as an example of a successful "independent" agency within the structure of the Ohio Department of Transportation. NS is familiar with the ORDC and has had some success with the agency, in particular the "third main" project in Cincinnati. The ORDC assisted with efforts to get the Regional Planning Commission to add the project to their Capital Improvement Program and ORDC helped arrange the capital grant. Overall, however, NS has found that the agency's effectiveness can be impacted by the need to serve two constituencies: the economically driven business community and the increasingly politically driven local communities. The needs of the two, while often mutually beneficial, can be directly opposed, leaving the agency unable to provide service to either.

The final measure of success will be the degree to which the Authority can respond to the challenges so succinctly outlined in the report. To summarize, NS is concerned that the Authority is structured to attract new sources of non-railroad private capital; supports the needs of rail freight specifically, recognizing its contribution to overall mobility and to the reduction of highway congestion; provides business representation on its Board; and its decisions are insulated from the political arena as much as practicable. One final concern: NS does not wish to see DRPT's value diminished in the process.

Sincerely,

C. W. Moorman

cc: David R. Goode
Karen Rae

INTRODUCTION

During the 2003 session of the Virginia General Assembly, Senator John S. Edwards of Roanoke sponsored and secured passage of Senate Bill (SB) 1279. In debate and discussion of the bill he provided the following arguments in its support:

> This bill would create a rail transportation development authority in Virginia to help finance rail lines in Virginia. Mr. President, we all know we must have an intermodal transportation system in Virginia, and a rail component is absolutely essential if we are going to have a 21st Century transportation system.
>
> Unfortunately, in terms of infrastructure and the capital, the railroads don't have the money, the state doesn't have the money, and the federal government is not giving us any money to do this, so we need to create an authority which can issue bonds to be paid for with the surcharge on the freight (for example) to upgrade the rail lines. There is a great need to upgrade the rail-lines parallel to I-81 in order to shift some of the truck traffic to trains. There is a great need to upgrade the rail lines for high-speed rail. There is a great need to upgrade the rail lines for the TransDominion Express, and I am sure there are other needs as well.
>
> So this would give us an opportunity to provide the capital improvements that are so essential to upgrading the rail lines.[1]

Senate Bill 1279

SB 1279 calls for the creation of the Virginia Rail Transportation Development Authority. The purpose of this authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment or infrastructure, upon a determination by the authority that such action is in the public interest." The bill provides that the authority shall have the following powers "together with all powers incidental thereto or necessary" for their performance:

> 1. To sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties;
> 2. To adopt and use a corporate seal and to alter the same at pleasure;
> 3. To enter into contracts and agreements;
> 4. To establish bylaws and make all rules and regulations, not inconsistent with the provisions of this chapter, deemed expedient for the management of the Authority's affairs;
> 5. To borrow money and to accept contributions, grants, and other financial assistance from the United States of America and agencies or instrumentalities thereof, the Commonwealth, or any political subdivision, agency, or public instrumentality of the Commonwealth;
> 6. To issue bonds in accordance with applicable law, including the issuance of bonds and other evidences of debt, in order to finance or assist in the financing of rail transportation projects undertaken under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or any other rail transportation project in the Commonwealth determined by the Authority to be in the public interest;
> 7. To make loans or grants for purposes that are consistent with this chapter and otherwise to receive and expend moneys on behalf of the Authority; and

8. To acquire land or any interest therein by purchase, lease, gift, or otherwise, and to hold, encumber, sell, or otherwise dispose of such land or interest, for purposes consistent with this chapter.

The full text of the bill may be found in Appendix A.

Senate Joint Resolution No. 354

In addition to SB 1279, the Senate passed a companion measure, Senate Joint Resolution (SJR) No. 354. SJR 354 describes the rationale behind the creation of the authority as follows:

- "Improvement and expansion of rail freight and passenger infrastructure and facilities in Virginia can reduce the need for expenditures on highway construction and maintenance by diverting both freight and passenger traffic from highway to rail."
- "The diversion of passenger and freight traffic from highway to rail reduces congestion, promotes safety, and avoids significant air and water pollution."
- "The freight railroads that currently own and operate most of the rail lines in Virginia do not have the financial resources to make many of the improvements to rail facilities and infrastructure that might clearly be in the public interest."
- Therefore, "the Virginia Rail Transportation Development Authority is required, pursuant to SB 1279 (2003), to 'finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment, or infrastructure.' "

In addition, the bill requests the Virginia Department of Rail and Public Transportation (DRPT) to study the Virginia Rail Transportation Development Authority to finance improvements to railroad freight and passenger transportation in Virginia. The DRPT asked the Virginia Transportation Research Council to assist in carrying out this study. This document is the Research Council's report to the DRPT.

The full text of the resolution may be found in Appendix B.

SCOPE

SJR 354 specifically requests that the study:

(i) analyze the feasibility of various options to finance improvements to railroad freight and passenger transportation in Virginia, including strategies that may be considered by the Virginia Rail Transportation Development Authority, pursuant to SB 1279 (2003);

(ii) conduct a literature search of national best practices relative to creating rail authorities and other relevant issues;

(iii) examine how the Virginia Rail Transportation Development Authority can finance and facilitate financing of the acquisition, construction, repair, improvement, and extension of rail facilities, including rolling stock and infrastructure that the Authority determines to be in the public interest; and

(iv) recommend the appropriate structure, powers and duties of the Authority, and revenue and sources of revenue needed to perform its responsibilities.

METHODOLOGY

To achieve the study objectives of addressing the four tasks specified in SJR 354, the study team did the following:

The environment in which the proposed new Virginia rail authority would function was examined. A discussion of the state of freight rail today is presented. This discussion shows how important the maintenance of a healthy rail system is to the highway network. It also shows the environment in which the new rail authority would operate.

A survey of the Virginia Port Authority (VPA), the DRPT, the Virginia Resources Authority (VRA), and 11 rail entities in other states was conducted. In this response to Task 2, the research team examined the entities in other states that most resembled the proposed Virginia Rail Transportation Development Authority either in its goals or in its structure. A variety of sources were examined, but the emphasis was on the enabling legislation. It was felt that the structure of the entities as well as their powers would most clearly be revealed by examining the enabling legislation that created them. Annual reports and other financial statements as well as published articles were examined. In a few cases, a telephone interview was conducted to gain more information about the actual operation of the authority. The research team also examined the enabling legislation of the DRPT, the VPA, and the VRA. Again, it was felt that the enabling legislation would reveal a great deal about the structure and powers of each of these organizations. Information about the finances and operations of these organizations was also gathered.

Financial issues concerning the new authority were examined. Tasks 1 and 3 are so closely related that the research team decided to address them jointly by investigating the following questions:

- How can an organ of the Commonwealth mobilize additional capital for investment in rail transport?
- How can an organ of the Commonwealth participate in the rail transport sector?
- What institutional structure would best suit a Commonwealth organ whose purpose is to mobilize capital for rail investment?

- What other policy initiatives of the Commonwealth might indirectly affect the purposes envisioned for the Virginia Rail Transportation Development Authority?

Three options regarding the creation of the new authority were examined. In response to the request in Task 4 for recommendations as to the appropriate structure, powers, and duties of the proposed authority, as well as sources of revenue, the research team examined three important options regarding the creation of the authority. The team applied the insights derived from the investigations undertaken in response to Tasks 1, 2, and 3 in an attempt to make clear the pros and cons of each. These options included:

- Option 1: Create an independent rail authority with bonding powers.
- Option 2: Create a new rail agency within the government with bonding powers.
- Option 3: Do not create a new authority or a new agency: Give bonding powers to the DRPT.

Finally, the possibility that the proposed rail authority with its intended purpose would violate Article 10, Section 10, of the Constitution of Virginia was examined.

THE STATE OF FREIGHT RAIL TODAY

What follows is devoted to describing briefly the state of (primarily) the rail freight industry today. Intercity passenger rail is not discussed in any detail not because it is not important in its own right, but because, at the present time, it represents a very small fraction of intercity rail activity and a very small component of intercity passenger movement. Also, a large part of the focus here is on the needed improvements to the rail infrastructure, and intercity passenger service and intercity freight service share the same infrastructure. The vast majority of intercity rail is freight rail. That notwithstanding, part of the problem with it is that there still is not enough of it. Its viability as a shipping mode is hindered, in part, by the constraints placed on it by aging and inadequate infrastructure. Improvements in rail infrastructure are likely to have beneficial societal consequences in other areas of transportation—such as the reduction of congestion on the highways, reduced pollution, etc. This study focuses on a solution to the problem of finding a mechanism for financing the improvements to rail infrastructure. The narrative that follows attempts to show the rail environment in which the rail authority proposed by SB 1279 will function. The focus here is on the importance of rail for other modes of transportation and for the economy, the problems associated with the railroads' inadequate infrastructure, and the need for capital to upgrade the infrastructure. This is a limited range of topics. No doubt there is a wide range of other railroad issues that are important, but the focus here had to be the context in which the new authority would make its most significant contribution, which is the financing of improvements to rail infrastructure.

Much of the material for this section on the state of rail today is drawn from two excellent reports: the *Freight-Rail Bottom Line Report,* published by the American Association

of State Highway & Transportation Officials (AASHTO), and the *Mid-Atlantic Rail Operations Study,* published by the I-95 Corridor Coalition in 2002.[2]

A Brief History of Rail in the United States

The introduction of rail technology in the middle of the 19th century made it possible for business and industry to locate in areas that were not adjacent to or close to seas, rivers, or ports. Within a short period of time, the railroads opened up much of the interior of the North American continent. The construction of the nation's rail network began in 1828. The rail system expanded rapidly during the late 1800s and early 1900s. By the 1920s, the system mileage had peaked at about 380,000 miles of track.

Today, the Class 1 railroads have about 172,000 miles of track. The development of truck and highway technologies in the early 20th century made it possible for business and industry to locate away from rail lines and terminals. An east-west and north-south interstate highway grid was built to connect cities and regional economies. Production and consumption centers migrated outward from city centers, taking advantage of inexpensive land that was made accessible by the highway system and the trucks that used it. Long-haul trucking captured a large share of east-west freight traffic from railroads and much of the north-south freight traffic from coastal steamers and river barges. Although rail freight carriers and water freight carriers continued to service some traditional markets, trucks were the only way to serve the new suburban and ex-urban markets. Thus, trucking became the dominant mode of freight transportation during the latter half of the 20th century.

The rise of the trucking industry was only one of the factors that contributed to the reduction in size of the rail system. Deregulation allowed railroads to eliminate lines and services with insufficient traffic density to cover operating and maintenance costs adequately. To meet increasing competition from other modes, they have invested in double-stack cars, larger hopper and tank cars, and higher boxcars and auto-rack cars, which in turn require investment in high-clearance tunnels, higher-weight-capacity track, and stronger bridges. The high cost of these improvements has limited railroads to upgrading only the highest volume and most profitable lines. Other lines have been downgraded or abandoned. (Some lines have also been abandoned because mergers between railroads have made some lines redundant.)

Late in the 20th century and early in the 21st century, the global economy has been built on information, telecommunications, and long-haul transport by water, rail, and air. The use of containers has efficiently linked trucks, trains, and container ships. The development of information and communication technologies has made it possible to manage freight transport around the globe so that it is reliable, visible, reasonably secure, and cost-effective.

Freight Rail Services Today

At the present time, rail provides three types of freight service:

1. *Bulk Unit Train.* Bulk unit trains carry high volumes of a single commodity such as coal, grain, or minerals. These trains tend to be "one way"; that is, they are loaded from the shipper to the receiver, but they are returned to the shipper empty. These trains usually move "door-to-door"; that is, they move from the shipper to the receiver entirely by rail. Unit trains tend to move along well-defined, high-density corridors. In 2000, unit trains carried 1.027 billion tons over 582 billion ton-miles. This is the equivalent of 25.1 billion truck miles.

2. *Mixed Carload.* Mixed carload trains move a diverse range of commodities, including chemicals, food products, forest products, metals, auto parts, waste, and scrap. Rail carload equipment includes liquid-bulk tank cars, open flatcars, hopper cars, and traditional boxcars. Carload trains go to the receiver loaded and return to the shipper empty. Most carload trains move door-to-door. Carload trains usually deliver heavy products that are sensitive to transportation costs. However, because carload trains require a much higher degree of handling and management than unit trains, it can be hard to achieve economies of scale. In 2000, carload trains carried 783 million tons over 236 billion ton-miles, which is equivalent to 20.1 billion truck miles.

3. *Intermodal (Container, Trailer, and Automobile).* Intermodal trains move truck trailers and containerized goods containing finished consumer goods, refrigerated foods, parts and tools for manufacturing, raw materials, post-consumer scrap, and just about anything else that can be packed into a container or a truck. (Rail shipments of automobiles share many of the characteristics of intermodal merchandise.) Intermodal trains are usually loaded both for the original trip from the shipper to the receiver and for the return trip. In 2000, intermodal trains carried 199 million tons over 421 billion ton-miles. This is the equivalent of 16.2 billion truck miles. Intermodal service has been one of the fastest growing areas of freight rail.[3]

The Benefits of a Healthy Freight Rail System

Economic Benefits to Shippers

Railroads provide shippers of heavy materials or large volumes of materials with a shipping option that is significantly more cost-effective than shipping by truck. Depending on the density of the commodity, one railcar may move the same weight or volume as four or five trucks. For such shippers, shipping by rail is an essential option. To demonstrate the value of freight shipping by rail, AASHTO's *Freight-Rail Bottom Line Report* offers the following hypothetical case: What if shippers in 2000 did not have access to rail and instead made the equivalent shipments by truck paying truck rates? Freight carried by rail in 2000 amounted to 1,239 billion tons at $.024 per ton for a total of $30 billion. If this 1,239 billion tons were shifted to trucks at the prevailing average truck rate of $.080 per ton, the cost to shippers would be $99 billion—an increase of $69 billion.[4]

Benefits for Transportation Systems Capacity and Cost

Trains handled 28 percent of all freight ton-mileage in the United States in 2000. This reduced the pressure on the nation's highways. If everything that moved by rail had been

transferred to trucks, an additional 61.4 billion truck vehicle miles traveled (VMT) would have been logged.

AASHTO's *Freight-Rail Bottom Line Report* offers the following hypothetical case in an attempt to demonstrate the value of railway freight delivery: How much additional highway funding would be needed between the year 2000 and the year 2020 if freight-rail service were unavailable and business and industry were forced to make the equivalent shipments by truck? In order to answer this question, the FHWA's Highway Economic Requirements System (HERS) model was used to estimate highway-needs costs. A first approximation analysis found that combination-truck VMT would increase by 38 percent over the baseline combination-truck VMT forecast for the year 2020. The cumulative increase in highway funding required to accommodate this increase in VMT over the 20-year period would be $64 billion.

Many states are responding to increased pressure on their interstate and state highway systems by looking into rail improvements. Rail is cost competitive for some kinds of intercity freight shipments. In some intercity corridors, it may be less expensive to boost capacity by improving the rail system than by adding or widening highways. It is believed that better rail service would attract and offset truck traffic, thereby creating additional highway capacity for automobiles.[5]

Intermodal Connectivity and International Trade Benefits

Railroad freight is a critical link in the nation's intermodal freight transportation system. The rail and trucking industries are both competitors and partners. Unless a rail shipment is door-to-door, it begins and ends with a truck move. Rail and trucking companies are partnering to provide integrated door-to-door intermodal services that optimize the relative strengths and efficiencies of each mode.

Ports are also dependent on rail. Ports rely on rail to provide them with connections to shippers and receivers of bulk, carload, and intermodal freight. Rail typically accounts for 10 to 50 percent of a port's landside traffic. The following ports are especially dependent on rail: (1) those handling coal and grain, (2) those handling high volumes of chemicals, oils, lumber, paper, and other carload commodities, and (3) those that are major container gateways that serve large inland markets via landbridge operations.

Ports compete to attract the business of ocean carriers and major shippers. These carriers and shippers look closely at the inland distribution costs associated with ports-of-call because inland transportation can account for half of the end-to-end cost of an overseas move. Ports that do not offer rail service or that cannot accommodate equipment such as double-stack container cars or heavy bulk cars on key routes are at a competitive disadvantage. As a consequence, many ports are taking the lead role in making rail access improvements. By serving the nation's seaports, rail becomes a critical element in the nation's access to global markets.[6]

Environmental Benefits

Railroads provide significant environmental benefits. The U.S. Environmental Protection Agency estimates that for every ton-mile, a typical truck emits roughly 3 times more nitrogen oxides and particulates than a locomotive. Other studies suggest that trucks emit 6 to 12 times more pollution per ton-mile than do locomotives, depending on the pollutant measured. According to the American Society of Mechanical Engineers, 2.5 million fewer tons of carbon dioxide would be emitted into the air annually if 10 percent of intercity freight now moving by highway were shifted to rail. If 10 percent of the freight moved by highway were diverted to rail, the nation would save as much as 200 million gallons of fuel annually. In 2000, railroads moved a ton of freight an average of 396 miles per gallon of fuel.[7]

Emergency Response Benefits

Over the past decade, transportation logistics managers have focused on increasing efficiency as a means of reducing the need for infrastructure. States and metropolitan planning organizations have adopted aggressive system-management, demand-management, and intelligent transportation system strategies. Shippers have implemented just-in-time delivery strategies, centered on information and transportation system reliability, to reduce inventory and warehousing requirements. However, the terrorist attacks of September 11, 2001, showed that a transportation system at risk of disruption must provide an excess of capacity (some amount of transportation redundancy) or face the possibility of catastrophic breakdown. The railway freight system provides the critically needed alternative mode of transportation in case of an emergency. A nationwide rail network connecting U.S. cities, states, and seaports provides a measure of system redundancy that affords needed insurance against the loss of highway capacity for both freight and passengers.[8]

The Freight-Rail Business Today: Freight-Rail Market Share, Revenues, and Capital Needs

Recent gains in productivity and service quality have slowed the precipitous decline of rail market share. The railroads' full share of the freight market, measured as a percentage of ton-miles over the nation's freight system, has stabilized at 28 percent. However, productivity gains and lower rates have not been sufficient to bring about substantial gains in market share, and shares measured in tonnage and revenue terms have continued to drop.

Competitive pricing by the railroads has been a critical factor in rail's ability to stabilize and maintain its market share. The result has been a steady decline in rail revenues on a ton-mile basis. This has been offset to some extent by productivity gains, disinvestments in under performing assets, and other business strategies. Overall, the railroad return on investment has actually improved somewhat, from around 4 percent in 1980 to around 6 percent in 2000. However, railroad return on investment has been well below the cost of capital (10% or more). The gap between the return on investment and the cost of capital indicates that most of the benefits of railroad reorganization and productivity improvements have accrued to the shipping

community in the form of rate cuts, rather than to railroads and their investors. This is a major problem for the railroad industry because it is an extraordinarily capital-intensive industry. In 2000, Class 1 railroads invested 17.8 percent of their revenues in capital improvements, compared to an average of 3.7 percent for all manufacturing industries. Between 1991 and 2000, it is estimated that the railroads invested $54 billion in their systems.

Wary of the gap between railroad capital needs and net operating income, investors have backed away from railroad stocks. This has reduced the amount of capital available for railroads to invest, forcing them to borrow money to maintain and expand infrastructure or to defer maintenance and improvements. Railroads are not attracting the long-term investment needed to grow substantially and serve new markets.[9]

Scenarios for the Future of the Freight Railroad System

Freight Forecasts and Impacts on the Transportation System[10]

Different regions of the nation are growing at different rates and will experience corresponding differences in the rate of freight growth. Based on the adjustment of 1998 regional growth rates to the year 2000 base forecast, growth during the period 2000 to 2020 has been forecast at 76 percent in the West, 71 percent in the South, 63 percent in the Central Region, and 58 percent in the Northeast. However, the highest increases on a volume (rather than a percentage) basis will occur in the northeast and central regions because these regions have a larger base and concentration of existing freight activity.[11]

The baseline forecasts for each mode of transport in Reebie's TRANSEARCH database are based on the growth in the commodities that they handle. The baseline forecasts do not attempt to consider transportation constraints or opportunities that might cause traffic in certain commodities to shift from one mode to another, nor do they anticipate the effects of evolving logistics strategies. Here are some of the baseline forecasts:

- Trucking will grow from 10,700 million tons in 2000 to 17,296 million tons in 2020, which is an increase of 62 percent. Ton-miles will grow from 2,639 billion in 2000 to 4,174 billion in 2020, which is an increase of 58 percent.

- Rail will grow from 2,009 million tons in 2000 to 2,891 million tons in 2020, an increase of 44 percent. Ton-miles will grow from 1,239 billion in 2000 to 1,821 billion in 2020, which is an increase of 47 percent. This is an average for all rail markets.

- Domestic waterborne commerce will grow from 1,054 million tons in 2000 to 1,470 million tons in 2020, which is an increase of 39 percent. Ton-miles will grow from 539 billion in 2000 to 617 billion in 2020, which is an increase of 14 percent.

- Air freight will grow from 9 million tons in 2000 to 25 million tons in 2020, which is an increase of 178 percent. Ton-miles will grow from 9 billion in 2000 to 27 billion in 2020, which is an increase of 182 percent.[12]

All of the modes of transport face problems associated with these increases in demand. Domestic freight tonnage will grow by about 70 percent in the next 20 years, and about 60 percent of this tonnage will be loaded on trucks and carried on highways that are already operating at or near capacity. This will almost certainly mean that there will be unacceptable levels of congestion and delay. Freight-truck traffic on the major corridors begins, ends, or passes through the nation's most densely populated metropolitan areas, thereby contributing to congestion where highway capacity is already at a premium.[13]

The railroads have significant physical constraints too. These are for the most part in the form of choke points, such as, antiquated bridges, low-ceiling tunnels, "missing" connections, outdated signal systems that cannot accommodate both high-speed passenger trains and slow-speed freight trains, single line track without adequate sidings, bridges too weak to carry today's heavier rail cars, and inadequate terminal capacity. The rail network also has significant operational constraints: railroads must interchange traffic among themselves, share right of way with passenger rail, and cross highway traffic at grade. The railroads also have significant business requirements: in the face of limited profitability and capitalization, they must operate as bottom-line-oriented, for-profit businesses that live or die by quarterly profit statements and annual investment returns.[14]

Alternative Freight-Rail Growth Scenarios

The future of the nation's freight-rail system will depend on a combination of factors: underlying economic growth, railroad investment and operating/business decisions, public participation strategies, availability and performance of alternative freight modes, and shipper/market acceptance of railroad services. Here are four basic possibilities:

1. *No Growth*: This scenario assumes that the freight-rail industry makes only the minimum investment necessary to maintain current volumes; rail volumes do not increase; and rail loses substantial market share to other modes. In this scenario, rail moves 2,008 million tons over 1,239 billion ton-miles in 2020.

2. *Constrained Investment*: This scenario assumes that the freight-rail system will grow, but not sufficiently to accommodate the 2020 base-case volume (as will be discussed). In this scenario, railroads would fix some of the chokepoints but not all of them, and they will provide service where there is a strong profit incentive to do so; however, they will not meet all demands for service even if this means foregoing business that would use rail. This estimate assumes that freight rail absorbs only 50 percent of the base-case growth forecast. Thus, freight rail would move 2,451 million tons over 1,531 billion ton-miles in 2020.

3. *Base Case*: This scenario assumes that the freight-rail industry maintains its current market share in specific rail-served commodities. Unit train, carload, and intermodal services grow at different rates reflecting different growth rates in their underlying commodities. The base case assumes that freight-rail investments are sufficient to provide the capacity needed to accommodate this demand. In this scenario, freight-rail moves 2,891 million tons over 1,821 billion ton-miles in 2020.

4. *Aggressive Investment*: This scenario assumes that the freight-rail industry makes the investments and service improvements needed to meet and exceed the base-case forecast volume. It retains its existing share of total traffic and captures new business from truck and water freight. This estimate assumes that freight rail can attract an additional 9 percent of intermodal traffic and an additional 2 percent of carload commodities that currently move by truck or water. In this scenario, rail moves 3,486 million tons over 2,265 billion ton-miles in 2020.[15]

Highway Benefits Assessment

What are the effects of each of the scenarios on the nation's future highway costs? The FHWA's HERS model was used to determine the effects of each scenario on highway costs. Where rail was unable to accommodate its base-case volumes, the difference was converted to equivalent truck VMT and added to the highway network. Where rail provided capacity in excess of its base-case volumes, the difference was subtracted from the highway network. Under the no-growth and constrained scenarios, rail cannot accommodate its base-case volume, thereby resulting in the diversion of freight from rail to truck and generating more truck VMT and higher highway costs. Conversely, under the aggressive-growth scenario, rail volume exceeds the base-case volume, resulting in the diversion of freight from truck to rail thus reducing truck VMT and highway costs. Here are the results derived from the HERS model:

1. *No Growth*: Combination-truck VMT of 276 billion (31 billion over base case); cumulative highway needs of $1,900 billion between 2000 and 2020 ($21 billion over base case).

2. *Constrained*: Combination-truck VMT of 260 billion (15 billion over base case); cumulative highway needs of $1,889 billion between 2000 and 2020 ($10 billion over base case).

3. *Base Case*: Combination-truck VMT of 245 billion; cumulative highway needs of $1,879 billion between 2000 and 2020.

4. *Aggressive Investment*: Combination-truck VMT of 220 billion (25 billion under the base case); cumulative highway needs of $1,862 billion between 2000 and 2020 ($17 billion under base case).[16]

This analysis suggests that every 1 percent increase in truck VMT adds approximately $1.6 billion to the nation's highway bill for the period from 2000 to 2020. If the railroads were

unable to meet their base-case forecasts, the additional costs to the nation's highways from 2000 to 2020 would be between $10 billion (constrained scenario) and $21 billion (no-growth scenario). If, on the other hand, the railroads attract additional traffic from the highways, it would save the nation $17 billion over the same period. These cost estimates are conservative because they are based on a system-wide increase in truck VMT rather than VMT impacts in specific high-volume corridors. Also, although HERS captures some major highway costs such as road resurfacing and widening of existing roadways, it does not capture others such as bridges, interchanges, local roads, new roads, and system enhancements. Analysis of current highway expenditures suggests that HERS captures approximately 47 percent of total capital highway needs.[17]

The HERS analysis also produced estimates of costs (travel time, operating, and accidents) accruing to highway users, and the results are far larger than the highway needs alone. If the railroads were unable to meet their base-case forecasts, the additional costs to the nation's highway users from 2000 to 2020 would be $492 billion under the no-growth scenario and $238 billion under the constrained scenario. If the railroads attract additional traffic from the highways, it would save the nation's highway users $397 billion over the same period.[18]

Shipper Benefits Assessment

Diverting freight to or from rail would have a significant impact on highway costs. However, substantially greater impacts would be felt by shippers and consumers. Annual shipper costs in 2020 were estimated by comparing the truck ton-miles and rail ton-miles associated with the four scenarios and applying unit cost factors to calculate the probable change in transportation costs to shippers. As in the highway cost assessment, where rail was unable to accommodate base-case volumes, the difference was added to the highway network. Where rail provided capacity in excess of the base-case volume, the difference was subtracted from the highway network.

1. *No Growth*: 1,239 billion ton-miles by rail; an additional 582 billion ton-miles by truck (representing forecasted base-case rail traffic that cannot be accommodated by rail); total shipper costs of $76.3 billion in the year 2020, which is $32.6 billion more than the base case. Over a 20-year period, this is approximately $326 billion more than the base case.

2. *Constrained Investment*: 1,531 billion ton-miles by rail; an additional 290 billion ton-miles by truck (representing forecasted base-case rail traffic that cannot be accommodated by rail); total shipper costs of $59.9 billion in 2020, which is $16.2 billion more than the base case.

3. *Base Case*: 1,821 billion ton-miles by rail; total shipper costs of $43.7 billion in 2020.

4. *Aggressive Investment*: 2,265 billion ton-miles by rail; a reduction of 444 billion ton-miles by truck (due to the ability of the railroad system to accommodate volumes in

excess of the base-case forecast); total shipper costs of $18.8 billion in 2020, which is $24.9 billion less than the base case. Over a 20-year period, this is approximately $239 billion less than the base case.[19]

This analysis suggests that if the railroads were unable to meet their base case forecasts, the nation's rail shippers would pay an additional annual cost of between $16.2 billion (constrained scenario) and $32.6 billion (no-growth scenario) in 2020. If, on the other hand, the railroads were able to attract traffic from the highways, it could save the nation's shippers $24.9 billion in 2020. The cumulative amounts over these periods would be approximately ten times these amounts.[20]

The Transportation System in the Mid-Atlantic Corridor

Virginia lies in a strategic corridor of national significance. The transportation network in the Mid-Atlantic region serves and connects the nation's political capital, its financial capital, and 47 million people (if the New York City metropolitan area is included). The Mid-Atlantic is the gateway to New York State and New England. All together, the Mid-Atlantic states account for a quarter of the nation's population and a quarter of its jobs.

The Mid-Atlantic is the nation's largest producing and consuming market. About half of the truck-freight tonnage on its interstate highways and most of the rail-freight tonnage on its rail lines moves to and from states outside the region; consequently, transportation conditions in the Mid-Atlantic affect business and transportation decisions throughout the nation. The Mid-Atlantic is also the gateway to European; South American; and, increasingly, Asian markets. Its highway and rail networks provide landside connections to the region's major international seaports. The Mid-Atlantic transportation system is vital to the economic well being of the region and the nation.[21]

The Mid-Atlantic is facing a transportation capacity crisis. Its transportation network is severely congested. There are problems with all of the different modes of transportation; however, the most significant problems are on its highways. The FHWA's 1999 Highway Performance Monitoring System (HPMS) data show that the average annual daily traffic (AADT) volume on I-95 through the five-state region exceeds 100,000 vehicles. At the Washington, Baltimore, Philadelphia, and Newark metropolitan nodes along I-95, traffic volumes, which include commuter traffic as well as intercity traffic, range from 175,000 to 225,000 AADT. The HPMS data also show that I-95 is one of the nation's preeminent freight corridors. It carries more than 10,000 trucks a day. Trucks represent 10 to 20 percent of all vehicles on I-95. Although I-81 carries fewer trucks than I-95, they represent an even higher share of total vehicle traffic on the highway: 20 to 30 percent on a daily basis with peak period volumes of up to 60 percent (statistics from the Virginia Department of Transportation [VDOT]). I-81 carries about the same tonnage as I-95 because it has a higher share of long-haul, freight-truck traffic. The FHWA's Freight Analysis Framework project estimates that the tonnage of truck and rail freight moving in the region may increase by 70 to 80 percent by 2020. The FHWA's HPMS projections show significant increases in total AADT on I-95 and I-81 by 2020. These increases range from 10 percent on low-growth segments to 196 percent on high-growth

segments. Level-of-service measures show that many segments of I-95 and I-81 are already at or near capacity.

Overall, these congestion problems mean increased time, cost, and uncertainty for businesses and travelers, resulting in higher prices for consumers and reduced competitiveness for producers. Moreover, congestion in one mode adversely affects all modes because many passengers and most freight move in chained trips involving multiple modes. Capacity and congestion problems diminish the region's quality of life and attractiveness to business, impact emergency response capability, and make it more difficult to achieve public-policy goals for livable communities and economic development.[22]

The Role of Railroads in Meeting the Region's Transportation Needs

The extensive rail network in the Mid-Atlantic region includes a private freight network that includes two Class 1 railroads, an intercity railroad operating as a for-profit enterprise, and five commuter rail services. All of these railroads share track across much of the region.

Although the Mid-Atlantic rail system is a major carrier of passengers and freight, it is not operating at its full potential. Many segments of the system are capable of handling higher volumes of passenger and freight traffic, but these volumes cannot be accommodated because of critical choke points in the rail system.

Choke points are physical points in the rail system (bridges, tunnels, track segments) that have reduced capacity and operational capabilities in comparison to the rest of the system. Deficient information and management systems that constrain the effective utilization of the system as a whole are also considered choke points. The most critical choke points must be eliminated to unlock the full capacity of the rail network in the Mid-Atlantic and in Virginia. The critical types of choke points throughout the Mid-Atlantic—including Virginia—are:

- Antiquated and undersized bridges and tunnels.
- Lack of capacity on critical segments of freight and passenger lines.
- Inadequate vertical clearances for double-stack container traffic on freight mainlines.
- Inadequate connections between rail lines.
- Congested grade crossings, stations, and terminals.
- Outmoded and inadequate information and control systems.[23]

Eliminating choke points over portions of the rail network used by Amtrak and the commuter railroads will provide the following benefits to the public:

- Increased passenger capacity, helping offset the burden on congested air and highway systems.
- Enhanced safety, reliability, and emergency response.
- Greater ability to help the nation's passenger transportation network recover from service disruptions.[24]

Eliminating choke points will benefit Norfolk Southern and CSX by making it possible for them to improve freight service and attract new business. But there are also significant public benefits:

- Increased freight capacity, helping offset the need to run more trucks on congested highways.
- Upgraded service for double-stack intermodal container traffic and better access to international seaports.
- More freight service at competitive rates for shippers and receivers.
- Enhanced safety, reliability, and emergency response.
- Greater ability to help the nation's freight transportation network recover from service disruptions.
- Improved capability to support military mobilization.
- Reduced pollution.[25]

Improving the rail freight network also helps address congestion on the Mid-Atlantic's highway system. Trucking is—and will remain—the principal mode of transportation for freight because of its flexibility and cost, particularly for high-value, time-sensitive freight and shorter distance moves. For longer distance intermodal shipments and for bulk commodities, rail is highly competitive. Although it is impossible to say for sure how the improvements in rail infrastructure in will ultimately affect the railroads, the following general effects are anticipated:

- *Elimination of choke points would support the railroads in maintaining and growing their existing core business of hauling bulk commodities and intermodal freight.* According to Reebie's TRANSEARCH data for 2000, the Mid-Atlantic rail system handles more than 386 million tons of freight annually (mostly bulk freight moving east-west), which is equivalent to 82,000 truck trips per day. At growth forecast at 78 percent, rail would add another 300 million tons by 2020, the equivalent of more than 60,000 truck trips per day. If the rail system cannot handle this growth, the highway system must handle it.

- *The additional rail capacity brought about by the removal of choke points would benefit drivers and truckers using the key long-haul trucking corridors such as I-81, I-95, and I-78.* The Mid-Atlantic states are more dependent on long-haul trucking (moves longer than 500 miles) than the nation as a whole. Nationally, 16 percent of total domestic tonnage moves by long-haul truck. In the Mid-Atlantic, 18 percent of trips starting or ending in the region are long haul, and 35 percent of the trips passing through are long haul. If the choke points were eliminated, thereby enabling the freight railroads to offer more competitive levels of service and making it possible for the region to lower its reliance on long-haul trucking, then approximately 25 percent of long-haul traffic could divert to rail intermodal. If only new truck traffic between 2000 and 2020 is considered, leaving existing truck traffic in place, this would amount to about 12,000 trucks per day that could be diverted to rail. This would generate about 60 additional intermodal trains per day.[26]

A SURVEY OF RAIL ENTITIES IN VIRGINIA AND IN OTHER STATES: TASK 2 RESULTS

Introduction

In response to Task 2 of SJR 354, the following 11 rail entities in other states were investigated: the Alaska Railroad Corporation, California's High-Speed Rail Authority, California's Alameda Corridor Transportation Authority, the Florida High-Speed Rail Authority, the Maryland Transit Authority, New York's Southern Tier Extension Railroad Authority, the North Carolina Railroad Company, the Ohio Rail Development Commission, the Pennsylvania DOT, the South Dakota Railroad Authority, and the West Virginia State Rail Authority. The research team also examined the DRPT, the VPA, and the VRA.

These entities were chosen for a variety of reasons. First and foremost, after a preliminary investigation of their enabling legislation they seemed to resemble in important ways the Virginia Rail Transportation Development Authority proposed in SB 1279. They did not all resemble it in the same way; however, whatever similarities they did bear to it were sufficient to include it in the group that was investigated.

Part of the research team's search was motivated by the desire to find a suitable model for the authority proposed in SB 1279. One powerful motivation for choosing many of the authorities selected was their possession of bonding powers. It was felt that the power to issue bonds was a critical feature of the Virginia Rail Transportation Development Authority. Certainly, Senator Edwards attributed an enormous amount of importance to this power in his speech on the Senate floor in support of SB 1279: "[I]n terms of infrastructure and the capital, the railroads don't have the money, the state doesn't have the money, and the federal government is not giving us any money to do this, so we need to create an authority which can issue bonds . . . ." Of the entities listed, only the Florida High-Speed Rail Authority, the Maryland Transit Authority, the Pennsylvania DOT, and the DRPT do not have the power to issue bonds. It was thought, of course, that the authorities with bonding powers would more likely turn out to be suitable models for the Virginia Rail Transportation Development Authority.

Finally, it should be pointed out that some of these organizations are not, strictly speaking, authorities; however, they resemble authorities in so many important ways that it was thought that they should be included because they might still serve as a suitable model. Ohio is a case in point here. The Ohio operation, which is a part of the Ohio Department of Transportation (DOT), might very well serve in many ways as a model for the Virginia authority.

The detailed accounts of each entity's enabling legislation appear in Appendix C. The material that appears in Appendix C also includes brief accounts of each entity's financial information, which was drawn from a variety of sources, including financial statements, annual reports, publications not associated with the entity (newspapers, journals, magazines, etc.), and, in a few cases, telephone interviews. What follows is a brief summary of some of the important points from the accounts that appear in Appendix C.

The rail entities in other states can be loosely grouped into four categories:

- *Group 1:* Entities created to plan overall rail strategy and to buy/operate/improve/lease rail lines to preserve and expand service: Maryland, New York Southern Tier, Ohio, Pennsylvania, South Dakota, and West Virginia.

- *Group 2:* Dedicated to freight; constructed their own line: Alameda Corridor.

- *Group 3:* High-speed rail projects: California High-Speed Rail and Florida High-Speed Rail.

- *Group 4:* Lines owned by an independent entity, which receives help from the state. Focused on attracting new business and increasing revenues: Alaska and North Carolina.

Three Virginia entities are also described. More detailed accounts of their enabling legislation and powers may be found in Appendix C.

Results of the Survey

Group 1

Maryland

The Maryland Transit Administration (MTA) is part of the Maryland DOT.[27] Subject to the authority of Maryland's secretary of transportation and, in certain cases, the Maryland Transportation Authority, the MTA has jurisdiction to plan, develop, construct, acquire, finance and operate transit facilities.[28] A "transit facility" "includes any one or more of combination of tracks, rights-of-way, bridges, tunnels, subways, rolling stock, stations, terminals, ports, parking areas, equipment, fixtures, buildings, structures, other real or personal property, and services incidental to or useful or designed for use in connection with the rendering of transit service by any means, including rail, bus, motor vehicle, or other mode of transportation, but does not include any railroad facility."[29]

The MTA is required to "develop and coordinate policies and plans for the preservation, improvement, or provision of railroad facilities and railroad services" and to "conduct project planning and preliminary engineering related to railroad facilities."[30] In addition to planning, the MTA is charged with the duty to "supervise construction of State-owned or financed railroad facilities and related capital improvements"; "supervise maintenance and rehabilitation of State-owned or financed railroad facilities and equipment"; and "monitor railroad passenger and freight services to assure maximum benefits to Maryland communities and businesses."[31]

The MTA is required to recover 40 percent of its operating costs "from fares and other operating revenues" although it is also mandated to "establish a cost recovery goal of 50%."[32] In order to meet these goals, it is required to set "reasonable fares." To the "extent practicable,"

those fares must be sufficient, when added to other revenues, to "maintain, repair, and operate the transit and rail facilities"; "provide for depreciation" of those facilities; "replace, enlarge, extend, reconstruct, renew, and improve" those facilities; "pay the costs of purchasing, leasing, or otherwise acquiring rolling stock and other equipment"; "pay the principal of and interest on any outstanding obligations of the Administration"; "pay the current expenses of the Administration"; and "provide for any purpose the Administration considers necessary and desirable to carry out" its responsibilities.[33]

New York Southern Tier Extension Railroad Authority

The New York legislature created the Southern Tier Extension Railroad Authority as a "body corporate and politic constituting a public benefit corporation."[34] Its stated intent in doing so was "to preserve and enhance the system of railroads serving Chautauqua, Cattaraugus, Allegany, and Steuben counties in New York state and Warren and Erie counties in the Commonwealth of Pennsylvania, so as to ensure a healthy economy for these counties."[35] To this end, the stated purpose of the authority is to further develop and improve "railroad transportation" and other related services and to "develop and implement a unified railroad transportation policy and strategy" for the region.[36]

The authority may "establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair" a railroad facility or related facilities itself or provide for such as it sees fit, including through an agreement with a private for-profit firm.[37] It may also "acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities."[38] In addition, it may establish and join with others to establish and collect "fares, tolls, rentals, rates, charges and other fees" as well as schedules and standards of operation.[39] It may also "in its own name . . . apply for and receive and accept grants of property, money and services and other assistance offered or made available to it by any person, government or agency" and use such grants to meet capital or operating expenses or for any other reason it deems necessary.[40] Finally, the authority "may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of railroad facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority."[41]

The activities and operations of the authority are not subject to local laws[42] or to taxation from any state or local taxes.[43]

Ohio

The Ohio Rail Development Commission (ORDC) is "an independent agency of the state within the department of transportation."[44] The ORDC "shall . . . develop, promote, and support safe, adequate, and efficient rail service throughout the state," "[m]aintain adequate programs of investigation, research, promotion, planning, and development for rail service," and "[p]rovide for the participation of private corporations or organizations and the public in the development, construction, operation, and maintenance of rail service, and as franchisees thereof."[45]

The ORDC has the power to adopt, alter, and repeal bylaws; "adopt an official seal"; "maintain a principal office" and, if necessary, regional offices; "sue and be sued in its own name and plead and be impleaded in its own name"; "undertake . . . the acquisition, renovation, repair, refunding, operation, maintenance, or construction of any rail service project"; "establish and operate a revolving loan fund"; "issue bonds and notes and refunding obligations of the state"; "acquire by gift or purchase, hold, or dispose of real and personal property"; "make and enter into all contracts and agreements"; receive and accept grants from federal agencies; purchase insurance; "establish or increase reserves from moneys received"; "receive and disburse the proceeds" of bonds; make grants and provide consultation services to political subdivisions, transportation authorities, and other persons; "establish and amend the criteria and qualifications for the making of any loan"; and "do all acts necessary and proper to carry out the powers expressly granted to the commission."[46]

The DOT "may use all appropriate sources of revenue to assist the ORDC in developing and implementing rail service," but "all public funds acquired by the commission shall be used for developing, implementing, and regulating rail service and not for operating rail service unless the general assembly specifically approves" the expenditure of such funds.[47]

Either the ORDC or the DOT, acting on the behalf of the commission, "may apply for and receive from the United States government loans and grants in accordance with any federal law or program concerning rail transportation."[48] The ORDC may itself "issue grants and loans to any transportation authority or to any person for the purpose of continuing or instituting rail transportation in the state."[49]

The ORDC "may purchase or lease any portion of rail property of a railroad corporation, and may purchase or lease any other property, facilities, or equipment considered necessary by the commission for the operation of rail services, and the maintenance of track and other rail property."[50] The commission may also "restore, repair, relocate, or upgrade any rail property purchased, leased, or maintained by the commission" as well as "property owned by another person as long as such action is necessary for the efficient operation of rail services provided by the commission."[51] It may "obtain modernization loans from the federal government" to do this.[52]

The rail development fund consists of proceeds from the sale, lease, or transfer of any rail property owned by the commission and other money as provided by law. It "shall be used for the purpose of acquiring, rehabilitating, or developing rail property or service, or for the participation in the acquisition of rail property."[53] It "shall also be used to promote, plan, design, construct, operate, and maintain passenger and freight rail transportation systems, and may be used to pay the administrative costs" of the commission.[54] It may not be used to provide loan guarantees.[55]

There also exists a federal rail fund, which also consists of proceeds from the sale, lease, or transfer of rail property owned by the commission as well as other money as provided by law. It "shall be used to acquire, rehabilitate, or develop rail property or service; to participate in the acquisition of rail property with the federal government, municipal corporations, townships, counties or other governmental agencies; and to promote, plan, design, construct, operate, and

maintain passenger and freight rail transportation systems."[56] It, too, may be used to pay administrative costs but cannot be used to provide loan guarantees.[57] To acquire rail property, the ORDC "may obtain acquisition loans from the federal government or from any other source."[58]

The ORDC "may purchase any portion of the rail property of a railroad corporation and may purchase any other property, facilities, or equipment considered necessary by the commission for the operation of rail service" so long as the commission determines that the property is "suitable for the efficient operation of rail services" and the board approves.[59]

The ORDC "may issue bonds, payable solely from revenues, to pay the cost of or finance, in whole or in part, rail service projects" of the commission or loans to other authorities, towns, or counties.[60] When issuing bonds, the commission is authorized to determine the "number, location, and other characteristics of projects, including . . . assurance that the projects to be financed by bonds will create or preserve jobs and employment opportunities or improve the economic welfare of the state."[61]

The real and personal property of the ORDC "shall be subject to ad valorem, sales, use, and franchise taxes."[62] Bonds, however, "are free from taxation within the state."[63]

The Ohio General Assembly has deemed public private cooperation to be desirable and, therefore, the ORDC may encourage private participation.[64] To that end, the commission may adopt and amend rules "governing the process whereby a private corporation or organization may apply to the commission for a franchise for all or part of a rail system."[65]

Pennsylvania

The Pennsylvania General Assembly passed the Rail Freight Preservation and Improvement Act in response to its concern that the "satisfactory movement of goods within the Commonwealth and the economic health of Commonwealth industries [were] being jeopardized by the deterioration or inadequate provision of rail freight transportation services with the Commonwealth."[66] It consists of two distinct yet related components meant to address these concerns.

1. To undertake "either through its own staff or through use of a consultant or consultants, or both, a comprehensive freight rail study of rail freight transportation services, systems and facilities within the commonwealth and recommendations for their preservation and improvement."[67]

   To aid in this process, the legislature also created the Rail Freight Advisory Committee to "advise and comment on the comprehensive rail freight study, to advise and comment on all phases of the rail freight transportation program activities being undertaken or financially assisted by the department, and to propose methods, strategies or technologies for improving rail freight transportation services systems or facilities within the Commonwealth."[68]

2. To provide funding for essential improvements as determined by the comprehensive rail plan. The authority is authorized to "[p]rovide operating subsidy grants to rail companies, transportation organizations or municipalities to defray, or assist in defraying, the net deficit incurred by such entities in providing essential rail freight transportation" and performing "accelerated maintenance projects" within the Commonwealth.[69] It is also authorized to "[u]ndertake capital projects and to provide capital project grants to railroad companies, transportation organizations or municipalities" and to "[a]cquire by purchase, lease, eminent domain proceedings, gift or otherwise, all and any property, in such estate as determined by the secretary, for promoting the purposes of this act."[70]

South Dakota

The South Dakota legislature created the South Dakota Railroad Authority in response to what it deemed "a serious emergency as a result of the imminent abandonment by railroads of substantial services . . . and the deteriorated condition of their properties and facilities."[71] They found that this situation threatened the state's economic welfare and placed additional burdens on the state's highways but that the improvement of rail lines and rail service could not be achieved without public investment.[72] The authority was the vehicle by which the state intended to provide such investment.

It is vested with the following general powers: to employ agents and employees; to have and alter a common seal; to plan, establish, acquire, develop, construct, purchase, enlarge, maintain, equip, and protect railroads and railroad facilities; to conduct continuous studies of the need for such facilities; and to enter into contracts.[73] It may also acquire property through purchase, condemnation, eminent domain, or by grant.[74]

To finance its projects, the authority may borrow money and issue bonds. Repayment of bonds may come only from income and revenues derived from the facilities financed by those bonds.[75] The state is in no way obligated to repay the bonds.[76]

Despite these powers, however, the authority is not an autonomous body. Rather, it must receive prior approval for all expenditures from the South Dakota State Railroad Board and the governor.[77] In addition, the DOT "shall prepare or review and approve plans and specifications for and have supervision over any project to be undertaken by the authority."[78]

All property owned by the authority is tax exempt.[79]

West Virginia

The West Virginia legislature created the West Virginia State Rail Authority (SRA) under Chapter 29, Article 18, of the *Code of West Virginia* (also known as the West Virginia Railroad Maintenance Act) in 1975 in order to "participate in the rehabilitation, improvement and restoration of the financial stability of the railway system in the State of West Virginia and enable it to remain viable in the public sector as a mode of transportation."[80]

The SRA's purpose is to carry out rail projects or to subcontract out those projects to any person or government agency so long as those projects are consistent with "any applicable comprehensive plan for railroad projects approved by the authority."[81]

Among other powers, the SRA may "make loans and grants to governmental agencies and persons carrying out railroad projects"; issue bonds to pay for railway maintenance; acquire, hold, and dispose of real and personal property, including rail properties; exercise the power of eminent domain; "make and enter into contracts"; receive grants for state and federal agencies; engage in research and development; purchase insurance; set, alter and collect rates and other charges; establish, administer and coordinate a state plan for rail transportation; and to "do all things otherwise necessary to maximize federal assistance to the state under Title IV of the federal Regional Reorganization Act of 1973."[82] In addition, the authority "may sell, transfer or lease all, or any part, of the rail properties and other property acquired . . . to any responsible person, firm, or corporation for continued operation of a railroad or other public purpose."[83]

The SRA is also empowered to issue bonds in amounts it deems necessary in order to pay for rail projects.[84] It may, at its discretion, secure the proceeds of these bond issues by trust agreement.[85] Those bonds are debt of the state or any of its political subdivisions and are repayable solely from the revenues and funds pledged for their payment.[86] The SRA "shall deposit proceeds derived from" its actions into a "railroad maintenance authority fund" and "shall . . . use moneys in such fund to effectuate the provisions and purposes" of the enabling legislation.[87] Such funds can be used to study "any proposed railroad project."[88] The SRA may also invest any funds that it does not currently need; income from those investments will be credited to the fund.[89]

Group 2

Alameda Corridor Transportation Authority

The Alameda Corridor Transportation Authority was created by a joint agreement between the cities of Long Beach and Los Angeles in order to create a Consolidated Transportation Corridor (CTC) to improve rail service from the respective ports of Long Beach and Los Angeles to the central Los Angles area.[90]

The authority is vested with "the power common to Long Beach and Los Angeles necessary for the development of the Plan of the CTC and the implementation of the CTC and related facilities" as well as:

> any other powers authorized by the Act, to wit: acquiring, constructing reconstructing, rehabilitating, maintaining in whole or in part, and leasing or selling, in whole or in part, land facilities and appurtenances necessary or convenient for the development and operation of a CTC, including acquisition of such land, facilities, or appurtenances by lease, contract, or purchase or disposal of land by lease of any property of the Authority; and to incur debts, liabilities or obligations . . . and to sue or be sued in its own name.[91]

It may also incur debts and issue revenue bonds or other debt instruments.[92] The authority may issue revenue bonds only with the prior approval of the Council of Los Angeles and the Council of Long Beach. It does not, however, need prior approval to refund bonds.[93] Los Angeles and Long Beach are not liable or obligated to repay the authority's debts.[94] Rather, "it is anticipated that such bonds will be payable from Revenues generated from the CTC and/or by pledges of revenues by other responsible agencies, such as the Board of Harbor Commissioners of Long Beach and Los Angeles."[95] The authority's powers to acquire and operate facilities are "subject only to such restrictions upon the manner of exercising such powers as are imposed upon the City of Los Angeles in the exercise of similar powers."[96] The authority must issue an annual report as well as an annual independent audit.[97] The DOT "may, if requested by the [authority], exercise the power of eminent domain to acquire . . . real property in Los Angeles County that is owned by a railroad corporation and that is necessary, incidental, or convenient for the construction of the Alameda Corridor project."[98]

Group 3

California High-Speed Rail Authority

The California legislature created the California High Speed Rail Authority to "direct the development and implementation of intercity high-speed rail service" that is fully integrated with the state's existing transportation infrastructure.[99]

The powers of the authority are two-tiered. Initially, it is empowered only to "prepare a plan for the construction and operation of a high-speed train network for the state . . . . The plan shall include an appropriate network of conventional intercity passenger rail service and shall be coordinated with existing and planned commuter and urban rail systems."[100] To fulfill this purpose, the authority may: "conduct engineering and other studies related to the selection and acquisition of rights-of-way"; evaluate various high-speed rail systems and select one that is "appropriate"; "establish criteria for determining the award of a franchise"; "accept grants, fees, and allocations" from the state or its political subdivisions or from the federal government; "select a proposed franchisee, a proposed route, and proposed terminal sites"; "enter into contracts for preparation of the plan"; "prepare a detailed financial plan" and submit it to the legislature and to the governor; and keep the public informed of its activities.[101]

Once either the legislature or the voters approve of a financial plan to fund the construction of the high-speed network, the enabling legislation provides that the authority will be empowered to engage in the construction and oversight of a high-speed rail network. To this end, it will become vested with the power to: "enter into contracts with private or public entities for the design, construction and operation of high-speed trains"; "acquire rights of way through purpose or eminent domain"; "issue debt, secured by pledges of state funds, federal grants or project revenues"; "enter into cooperative or joint development agreements with local governments and private entities"; "set fares and schedules"; and "relocate highways and utilities."[102]

Florida High-Speed Rail Authority

The Florida High-Speed Rail Authority is a "body politic and corporate" and "an agency of the state" with perpetual succession.[103] It was created pursuant to an amendment to the Florida Constitution mandating that the state provide a high-speed rail system connecting the five largest urban areas of the state.[104]

The authority is vested with the power to "locate, plan, design, finance, construct, maintain, own, operate, administer, and manage the high-speed rail system in the state."[105] To this end, it may "purchase, lease, exchange, or otherwise acquire any land, property interests, or buildings or other improvements, including personal property within such buildings or on such lands, necessary to secure the rights-of-way for existing, proposed, or anticipated high-speed rail system facilities."[106] It may also dispose of any property pursuant to a resolution.[107] It may exercise all powers granted to corporations under the Florida Business Corporation Act with the exception that it may only incur debt as authorized by the legislature.[108] It may also seek and obtain federal matching funds with or without the assistance of the DOT.[109]

The DOT provides administrative support to the authority as requested by the chairperson of the authority but the "authority shall not be subject to control, supervision, or direction by the Department of Transportation in any manner."[110] Further, the authority may request technical, scientific or other assistance from the Florida Transportation Commission, the Department of Community Affairs, and the Department of Environmental Protection.[111] It is also required to develop, in conjunction with the Executive Office of the Governor, the Department of Community Affairs, and the Department of Environmental Protection "a process to prevent, mitigate, and resolve, to the maximum extent feasible, any conflicts or potential conflicts" of the system.[112]

In addition, the authority "shall develop a marketing plan, a detailed planning-level ridership study, and an estimate of the annual operating and maintenance cost for the system and all other associate expenses."[113] It is vested with the power to acquire property and rights-of-way, to dispose of land, and to engage in associated development (i.e., of a rail station).[114] It is also authorized to set and change rates, fees and other charges—which shall be used to pay the authority's administrative, design, construction and maintenance costs and "shall not be subject to supervision or regulation" by any body other than the authority.[115]

The authority "may employ procurement methods" under Florida state law but it may also "adopt rules for and employ procurement methods available to the private sector."[116] It may also "prequalify interested persons or entities prior to seeking proposals" for the various aspects of the system.[117] To do so it "may establish qualifying criteria that may include, but not be limited to, experience, financial resources, organization and personnel, equipment, past record or history of the person or entity, ability to finance or issue bonds, and ability to post a construction or performance bond."[118] It is also authorized to develop and execute requests for qualifications and proposals.[119]

The authority may also engage in "development of associated developments to be a source of revenue for the establishment, construction, operation, or maintenance of the high-speed rail system."[120]

All expenses incurred in carrying out the provisions of the act are payable solely from funds provided in the act and from other legally available sources.[121] The authority is tax exempt.[122]

Group 4

Alaska Railroad Corporation

The Alaska Railroad Corporation is "a public corporation and is an instrumentality of the state within the Department of Community and Economic Development." [123] At the same time, however, it "has a legal existence independent of and separate from the state."[124]

The state retains ultimate authority over the corporation's activities in several key areas. Legislative approval is necessary to convey the corporation's entire interest in land, to issue bonds, to extend railroad lines, to lease land for more that 55 years (unless the corporation reserves the right to terminate the lease if the land is needed for railway purposes), or to apply for or accept a grant of federal land.[125]

Nevertheless, the corporation's powers are broad. Among other powers, it is enabled to "adopt a seal"; to "adopt bylaws"; to "sue and be sued"; to "appoint trustees . . . and prescribe their powers and duties"; to "hire legal counsel"; to "make contracts"; to acquire and dispose of interests in land for the benefit of the corporation; to "contract with and accept" funds from the United States or the state of Alaska and its subdivisions; to maintain, operate and manage the corporation's property; to maintain offices and facilities as it sees fit; to prescribe rates and determine routes and schedules; to enter into contracts with other carriers; to hire and discharge personnel; to assume all rights, liabilities, and obligations of the Alaska Railroad; to maintain a security force; to issue bonds; to borrow money; to undertake and provide for the construction, maintenance and operation of railroads and rail facilities; and enter into agreements with state agencies or other instrumentalities of the state.[126] Further, it is empowered to "do all things necessary or desirable to carry out the powers and duties of the corporation granted or necessarily implied in this chapter or other laws of the state or the laws or regulations of the federal government."[127]

Oversight of these functions rests with a seven-member board.[128] The board is charged with the responsibility for managing and operating the railroad on a self-sustaining basis.[129] Despite its responsibility, however, the board may apply to the legislature for state appropriations "to be used to provide a particular service that is not otherwise self-sustaining if a subsidy is required to maintain that service."[130] It also has the authority, contingent on approval from the legislature, to issue bonds to raise needed capital.[131]

Consistent with its oversight responsibility, board approval is required for major decisions. Board approval is required for the corporation to issue bonds; to mortgage or pledge corporation assets; to donate property or assets of the corporation; to act as a surety or guarantor; to adopt a long-range capital improvement program; to adopt annual reports; to change rates or services levels; to expand rail lines; to select independent auditors and accountants; to enter into collective bargaining agreements; to adopt annual budgets; to adopt any capital project estimated to cost $500,000 or to last for more than one year; to exchange, donate or convey the corporation's entire interest in land subject to legislative approval; or to exercise the power of eminent domain.[132] In addition, it is the board's responsibility to establish all rules.[133]

Subject to board approval in these areas, however, responsibility for day-to-day operations rests with the chief executive officer of the corporation. The board is required to delegate to the chief executive officer "powers and duties necessary or appropriate for the management of the daily affairs and operations of the corporation."[134]

The corporation's real and personal property, assets, income and receipts are exempt from all state taxes. Further, its bonds and notes are also exempt from taxation (except for inheritance, transfer, and estate taxes).[135]

North Carolina Railroad Company

The North Carolina Railroad Company (NCRRC) is a Real Estate Investment Trust whose voting stock is owned completely by the State of North Carolina.[136] Chartered by the legislature in 1854 in order to spur economic activity in the state, the company constructed 223 miles of track from Goldsboro to Charlotte.[137] In 1989 the NCRRC combined with another state-owned rail corporation to extend its overall line to approximately 317 miles of track, which runs from Charlotte to the Morehead City Port Terminal on the Atlantic Coast.[138]

The NCRRC owns and manages the entire line along with several other properties and leases exclusive freight trackage rights to Norfolk Southern, which is also responsible for the maintenance of the line for freight purposes.[139] In addition, Amtrak provides passenger service over the NCRRC's lines pursuant to an agreement with Norfolk Southern.[140]

The *Code of North Carolina* provides that the NCRRC, as a railroad corporation, has the following powers: "To survey and enter on land"; "to condemn land under eminent domain"; "to take property by grant"; "to purchase and hold property"; "to grade and construct road"; "to intersect with highways and waterways"; "to intersect with other railroads"; "to transport persons and property"; "to erect stations and other buildings"; "to borrow money, issue bonds, and execute mortgages"; "to lease rails"; and "to establish hotels and eating houses." [141]

Further, as a state-owned railroad company, the NCRRC possesses "in addition to the powers of any railroad corporation" the power to "[l]ease, license, or improve" its property and the power of eminent domain.[142]

As a Real Estate Investment Trust, the NCRRC must distribute 90 percent of its profits to maintain its tax-exempt status.[143] The state, as the sole owner of the company, receives all of

those funds. However, as the *Code of North Carolina* currently provides, 100 percent of the annual dividends received by the state must be used "by the Department of Transportation for the improvement of the property of the [company] as recommended and approved by the Board of Directors" of the company.[144]

Virginia Entities

Virginia Port Authority

The VPA is a political subdivision of the Commonwealth whose duty is "to foster and stimulate the commerce of ports of the Commonwealth."[145] Its major activities include "developing water transportation facilities; providing security services; maintaining ports, facilities, and services; providing public relations and domestic and international advertising; and with offices in the United States and several Foreign Countries, developing Virginia's ports through cargo solicitation and promotion throughout the world."[146] To further these goals, the VPA established Virginia International Terminals, Inc. (VIT) in 1982 in order to operate the terminals.[147]

In carrying out this endeavor, "[a]ll of the powers, duties and rights" of the VPA conferred by the state are to "be exercised by the Board of Commissioners of the Port Authority."[148] The board, however, is required to appoint an executive director who, subject to the board's approval, "shall employ or retain such other agents or employees subordinate . . . as may be necessary."[149]

The VPA is vested with the following general powers: to sue and to be sued, to make contracts, "to adopt and use a common seal and alter such at its pleasure," to procure insurance, and to develop policies and procedures for the procurement of goods, services and construction based on competitive principles."[150] In addition, the VPA is empowered to "have and maintain" a principal office as well as branch offices if necessary.[151] The enabling legislation also grants the VPA general police powers[152] as well as the power of eminent domain,[153] and the power to set rate structures, to employ personnel and legal counsel, to make and enforce reasonable rules and regulations regarding its ports, to cooperate with federal agencies, and to apply for and accept grants or loans of money or property.[154]

The VPA is exempt from the Public Procurement Act and the Virginia Personnel Act.[155] In addition, it is empowered to appoint, employ, dismiss, fix and pay compensation to employees, officers, agents, advisers, and consultants, including financial and technical advisers, engineers and public accountants" and to "determine the duties and compensation" of those employees "without the approval of any other agency or instrumentality."[156]

The VPA is empowered to issue revenue bonds in order to "acquire, construct, maintain, equip, and operate marine terminals, port facilities, wharves, docks, ships, piers, quays, elevators, compressors, refrigeration storage plants, warehouses, and other structures necessary for the convenient use of the same in the aid of commerce."[157] Those bonds are exempt from state and local taxes.[158] They are not, however, backed by the full faith and credit of the

Commonwealth or any political subdivision.[159] Thus, if the VPA cannot repay its bonds on its own, the Commonwealth is not legally bound to repay them. Further, while the VPA may issue bonds to acquire property and equipment, it is prohibited from expending funds or contracting a debt that will benefit privately owned property unless use of the improved property "is guaranteed to the authority or the Commonwealth by a lease extending beyond the useful life of the improvement, repair, maintenance, addition or new facility, or such expenditure or indebtedness is approved in writing by the governor."[160] The VPA is also empowered to "rent, lease, acquire, construct, and dispose of harbors, seaports, port facilities, and such property, whether real or personal, as it may find necessary or convenient and issue revenue bonds therefore without pledging the faith and credit of the Commonwealth."[161] It may not, however, have at any time more than $200 million in total principal outstanding, an amount that includes refunding bonds but excludes revenue bonds.[162]

The VPA may issue refunding bonds as it "may deem necessary, but not exceeding an amount sufficient to provide for the payment of the principal of the bonds so to be refunded, together with all unpaid interest accrued and to accrue and with any redemption premium thereon and all costs and expenses incident to the authorization and issuance of such bonds as determined by the Authority."[163] The bonds "shall be dated, shall bear interest at the prevailing rate of interest at the time, shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the Authority."[164] The VPA may make the bonds "redeemable before maturity . . . at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of bonds."[165] "The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest."[166] All bonds are to be signed by the executive director or "shall bear his facsimile signature" as well the official seal of the VPA or a facsimile.[167] All bonds are "declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the Commonwealth."[168] The bonds "may be issued in coupon or in registered form, or both" and the VPA "may sell such bonds in such manner, either at public or private sale, and for such price, as it may determine will best effect the purposes of this chapter."[169]

"The proceeds of the bonds of each issue shall be used solely for the payment of the cost of acquisition, construction, reconstruction and control of port facilities . . . or, in the case of refunding bonds, to refund such bonds including any unpaid interest accrued and to accrue and any redemption premium thereon and all cost and expenses incident to the issuance of such bonds."[170] The VPA may not issue any other bonds without prior approval of the majorities of both houses of the General Assembly.

The VPA, at its discretion, may secure its bonds "by a trust agreement by and between the Authority and a corporate trustee." [171] The VPA is authorized to create a sinking fund to be used to repay its bonds.[172] Proceeds of bond issues "shall be deemed to be trust funds to be held and applied solely as provided" by the law. [173] Bondholders have the power to sue the VPA at law or in equity "except to the extent the rights herein given may be restricted by . . . trust agreement." [174] Bonds issued by the VPA are legal investments "in which all public officers and public bodies of the Commonwealth and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and

other fiduciaries may properly and legally invest funds."[175] All of the VPA's power "shall be liberally construed" to effect its purposes.[176]

Virginia Department of Rail and Public Transportation

The DRPT reports to the secretary of transportation and is subject to the policy oversight of the Commonwealth Transportation Board (CTB).[177] Its director, who is appointed by the governor and serves at his or her pleasure, serves as a non-voting, ex-officio member of the CTB as well as on "any committee dealing with passenger and freight rail, transportation demand management, ridesharing, and public transportation issues."[178] The director of the DRPT is also vested with the authority "to do all acts necessary or convenient for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation."[179]

The DRPT has the following general powers: "to accept grants from the United States government and its agencies and instrumentalities"; "to make and enter into all contracts necessary or incidental to the performance of its duties"; "to assist other entities, public or private, in the implementation and improvement of passenger and freight rail, transportation demand management, ridesharing, and public transportation services and the retention of rail corridors for public purposes"; "to represent and promote the Commonwealth's interests in passenger and freight rail"; and "by any means whatsoever, to lease, improve, and construct rail" that are determined to be for the public good.[180]

In addition to its powers, the DRPT is also charged with various responsibilities. These responsibilities are: to "[d]etermine present and future needs for . . . public transportation . . . and the retention, improvement, and addition of passenger and freight rail transportation"; to "[f]ormulate and implement plans and programs for the establishment, improvement, development and coordination of public transportation . . . and the retention and improvement of passenger and freight rail transportation services and corridors in the Commonwealth"; to [c]oordinate with the Department of Transportation in the conduct of research, policy analysis, and planning for rail and public transportation modes"; to [d]evelop uniform financial and operating data and criteria for evaluating public transportation activities"; to [p]rovide training and other technical support services to transportation operators"; to [m]aintain liaison with state, local, district and federal agencies or other entities"; to [r]eceive, administer and allocate all planning, operating, capital, and any other grant programs"; to [a]dminister all state grants for public transportation, rail transportation, ridesharing, and transportation demand management purposes" to "promote the use of public transportation…and passenger and freight rail services"; to [r]epresent the Commonwealth on local, regional and national agencies . . . having responsibility for passenger and freight rail"; to [r]epresent the Commonwealth's interests in passenger and freight rail"; to [c]oordinate with the State Corporation Commission on all matters dealing with rail safety inspections and rail regulations which fall within its purview"; to "prepare and review state legislation and Commonwealth recommendations on federal legislation and regulations as directed by the Secretary of Transportation"; and to "[p]romote public transportation, ridesharing, and passenger and freight rail safety."[181]

Virginia Resources Authority

The VRA is a political subdivision of the Commonwealth of Virginia[182] that is granted "all powers necessary or appropriate to carry out and effectuate its purposes."[183] Those powers include the power to "have perpetual succession as public body corporate"; "adopt, amend and repeal bylaws, and rules and regulations"; "sue and to be sued"; "have an official seal and to alter it at will"; "maintain an office"; "make and execute contracts"; "sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any of its properties and assets; "employ officers, employees" and other advisors, including lawyers, financial consultants and engineers; "procure insurance"; "procure credit enhancements"; apply for and accept grants or contributions to carry out its purposes; enter into agreements with any agency or instrumentality of the Commonwealth, the federal government or the District of Columbia; invest or reinvest its funds; "establish and revise, amend and repeal, and to charge and collect, fees and charges"; and to "do any act necessary or convenient to the exercise of the powers granted or reasonably implied by this chapter."[184]

The VRA also has the power to borrow money and to issue bonds in amounts it determines to be "necessary or convenient to provide funds to carry out its purposes and powers" [185] and "to pledge any revenue or funds under the control of the Authority to the payment of its bonds or credit enhancements."[186] Such bonds are not backed by the full faith and credit of the state or another political subdivision but are payable only from "revenue, money, or property of the Authority."[187] Each bond will carry a statement on its face to this effect.[188] However, the Commonwealth may make grants of money or property to the VRA "for the purpose of enabling it to carry out its corporate purposes and for the exercise of its powers."[189] It may also issue refunding bonds.[190]

Bonds issued by the VRA "shall be authorized by a resolution of the Board of Directors."[191] They "shall bear the date or dates and mature at the time or times that the resolution provides, except that no bond shall mature more than 50 years from its date of issue."[192] The denomination of the bonds, the method and place or places of repayment, the rate of interest, and the date of repayment are determined by the VRA.[193] Bonds may be sold "at public or private sale at the price or prices that the Authority determines and approves."[194] "Bonds may be secured by a trust indenture between the Authority and a corporate trustee."[195]

Some Common Features of the Entities Surveyed

Any reader who looks at the more detailed accounts of the authorities that appear in Appendix C will find that the features of these entities are even more varied than they appear here. It would certainly be fair to say that one of the research team's findings is that there is no standard template or form on which to model an authority. The entities are as varied as their purposes, and as far as the research team can tell, they are none the worse for that. It is interesting to see that the idiosyncrasies of a particular entity are a product of the effort to 'design' the entity in such a way that it will successfully achieve its goals in the environment in which it finds itself. And this, of course, includes the political environment.

However, notwithstanding all of this, common features have manifest themselves. The common features listed are not characteristic of all of the entities. At least many of them are not. However, they appear often enough in the entities surveyed to warrant their appearance here.

Legal Status

Many public authorities are:

- Political subdivisions of the state.
- Tax-exempt.
- Exempt from many state laws (i.e., laws governing procurement procedures).

Powers/Duties

Many public authorities:

- May create procedures for the hiring of employees and outside consultants.
- May engage in long-term planning.
- May make use of studies by state agencies.
- May issue bonds not backed by the full faith and credit of their respective states.
- May acquire and dispose of land.
- May construct, maintain, and repair rail lines and rail equipment.
- May apply for and receive grants from the federal government.

Executive Director/Employees

Many public authorities:

- Require that the board of directors name an executive director.
- Empower that executive director to run day-to-day operations of the authority.
- Provide that major decisions (i.e. selling of assets, acquiring debt) require the approval of the board (and oftentimes the state legislature).

Board of Directors

Many public authorities:

- Have a board to provide oversight to the authority's activities.
- Have a procedure specifying who shall name members to the board and how those members are to be named (by specifying criteria for naming board members such as by geographic region, area of expertise, etc.).

- Have voting procedures, term lengths, and compensation levels set by their enabling legislation.
- Require that the board issue an annual report.
- Cede day-to-day control to an executive director.

FINANCIAL ISSUES: TASK 1 AND 3 RESULTS

Introduction

The first task specified in SJR 354 called for the DRPT to "analyze the feasibility of various options to finance improvement to railroad freight and passenger transportation in Virginia, including strategies that may be considered by the Virginia Rail Transportation Development Authority, pursuant to S. 1279." The third task called for the DRPT to "examine how the Virginia Rail Transportation Development Authority can finance and facilitate financing of the acquisition, construction, repair, improvement, and extension of rail facilities, including rolling stock and infrastructure that the Authority determines to be in the public interest." The questions in these two tasks are so closely related that the answers cannot help but overlap. A single set of questions and answers is therefore presented to satisfy these two tasks:

- How can an organ of the Commonwealth mobilize additional capital for investment in rail transport?
- How can an organ of the Commonwealth involve itself in the rail transport sector?
- What institutional structure would best suit a Commonwealth organ whose purpose is to mobilize capital for rail investment?
- What other policy initiatives of the Commonwealth may affect indirectly the purposes envisioned for the Virginia Rail Transportation Development Authority?

How Can an Organ of the Commonwealth Mobilize Additional Capital for Investment in Rail Transport?

For mobilizing additional capital for rail, the range of options available to the Commonwealth runs from small changes to existing practice that promise to raise a relatively small amount to significant departures that might raise hundreds of millions of dollars.

Private Money (Loan Guarantees)

The Commonwealth might draw private capital into rail by guaranteeing with its full faith and credit the debt that a private railroad incurs to upgrade its facilities. Virginia's investment in such a loan guarantee would be equal to the dollar value of the risk that it incurred. Such a

guarantee would enable a private railroad to borrow money at a more favorable rate of interest. Its success in attracting private investment would be defined as the additional credit that the railroad could obtain at any given interest rate.

The cost of a loan guarantee program and the amount of private investment that might be attracted are not estimated here. They are both assumed to be small. They would be constrained by the railroads' reluctance to take more debt onto their books.

Federal Money

The U.S. Department of Transportation administers a Congestion Mitigation and Air Quality Improvement Program (CMAQ).[196] The program, which was created in the 1991 Intermodal Surface Transportation and Efficiency Act (ISTEA) and continued in the 1997 reauthorization, the Transportation Equity Act for the 21st Century (TEA-21), has as its purpose to fund projects and programs that promise to reduce transport-related pollutant emissions in areas of the nation that the U.S. EPA currently finds to be air quality non-attainment and maintenance areas as those are defined by the Clean Air Act and its amendments. In the federal fiscal year 2003, $1.434 billion was authorized for CMAQ. CMAQ can fund a project in almost any surface transport mode, provided the project is expected to have a negative impact on pollutant emissions. According to its FY 03-04 budget, VDOT plans to spend $38.1282 million of CMAQ funds, including some investments in non-highway transport.[197]

Federal Rail Assistance Programs

The railroad rehabilitation and improvement financing program is intended to make funding available through loans and loan guarantees for railroad capital improvements.[198] TEA-21 authorized no direct federal funding; however, the U.S. Secretary of Transportation was authorized to accept a commitment from a non-federal source (e.g., a state government) to fund the required credit risk premium. "The aggregate unpaid principal amounts of obligations for direct loans and loan guarantees cannot exceed $3.5 billion at any one time, of which not less than $1 billion shall be available solely for other than Class I carriers." The railroad rehabilitation and improvement financing program is not expected to have much of an impact in Virginia because of the reluctance of the railroads to take on additional debt.

The Federal Rail Administration (FRA) provides a limited amount of money to Virginia for rail *studies*. This is the only federal aid that passes through the DRPT. For example, FRA provided $250,000 for the ongoing I-81 corridor study. FRA provided $50,000 for the North Carolina-Virginia High Speed Rail Commission.[199]

VDOT allocated $500,000 for "rail continuance assistance" in FY 03 and proposes to allocate $750,000 in FY 04.[200]

Other Federal Sources

The West Virginia SRA received a $2 million federal grant to make flood repairs to the West Virginia Central rail line that it had purchased.[201] The director of the Ohio Rail Development Commission, during an interview, mentioned that the commission takes advantage whenever it can of the Surface Transportation Safety grants that the FHWA makes available for conversion of at-grade railroad crossings to graded crossings.[202]

State and Local Money

The creation of a new revenue instrument, or the augmentation of an existing instrument, would no doubt be a contentious issue. With or without a new or augmented source of revenue, the commitment of available general funds to rail transport would no doubt be a contentious issue. These points conceded, it remains true that the Commonwealth has a variety of options for raising money for rail transport.

County and City Revenue

As they spend money to attract and steer economic development, the counties and cities of the Commonwealth might reasonably choose to use some of that economic development money to support a rail infrastructure investment. The most obvious candidates for support would be the construction or expansion of a train station (i.e., an intermodal freight or passenger facility) within the county's or city's jurisdiction or the improvement of the rail links to such a station.

As Virginia is a Dillon's Rule state, the local governments' independent means of raising revenue are restricted to those few enumerated in the state constitution or in *the Code of Virginia*. The ability of a local government to participate in rail investment may therefore depend on the General Assembly's permission for the city or county to appropriate state grants to that purpose.

Appropriations from General Revenue

The VRA administers two revolving funds, the Water Facilities Revolving Fund and the Water Supply Revolving Fund, which the General Assembly created to ease the financing of improvements to water utilities in the Commonwealth. The General Assembly has periodically expanded these funds with appropriations from general revenue.[203]

Dedicated Source of Tax Revenue

The General Assembly has on previous occasions dedicated all or part of the net collections from an existing revenue instrument to fund a transportation need. The 1986 "Special Session" of the General Assembly dedicated ½ percent of the state retail sales and use tax to the Transportation Trust Fund (TTF) for use by the CTB.[204] The sales and use tax on

motor vehicles, administered by the Department of Motor Vehicles, goes to the TTF in its entirety. The General Assembly dedicated a portion of the recordation tax to pay off the U.S. Route 58 bond issue.

In FY 2002, the sales tax added $322 million to the TTF.[205] Over the past seven fiscal years, 1996-2002, the TTF's take has averaged $334 million. As a first approximation, therefore, a ½ percent increment to the sales tax would add some $300 million to the Commonwealth's coffers.

User Fees

The Commonwealth's current holdings of rail assets are currently limited to a partial interest in a few facilities to whose upgrade the DRPT contributed some funds. (The state constitution requires that the Commonwealth take a partial interest, in a form other than stock, when it invests money for the benefit of a private entity.) However, VPA stands as an example of a state-created entity that operates a large transport asset, the Port of Virginia, and relies on that asset as *one* of its principal sources of revenue. As will be discussed, constructing or acquiring additional rail assets is one conceivable way that an organ of the Commonwealth could involve itself in the rail sector. A state-owned rail facility would, or could, generate a steady stream of revenue in the form of user fees.

By way of example, the amount of freight that railroads will carry through the I-81 corridor in Virginia in the year 2020 is 2.2 to 3.3 million net tons.[206] As the corridor is over 300 miles long and much of the traffic neither originates nor terminates in Virginia, the number of ton-miles of freight is 600 to 900 million per year. This implies that if state-funded improvements to the rail corridor created enough value to shippers to justify a surcharge of 1¢ per ton-mile on rail freight shipments, payable to the Commonwealth (as its partial interest in the improved properties), the 1¢ surcharge might raise $6 million to 9 million per year. This computation ignores any new freight or passenger traffic that the rail improvements might attract.

Bonds

The Commonwealth of Virginia, with its excellent credit rating, is able to raise hundreds of millions of dollars in the bond markets. Bonds are not a source of revenue, but issuing bonds allows a state agency to acquire a large sum of money immediately against the proceeds that a source of revenue is expected to bring in over a period of 15 to 30 years.

The bonds issued to finance the U.S. Route 58 Corridor Development Program have raised $704.3 million (net of financing costs of $15.8 million) since the first sale in 1989.[207] A portion of the real estate recordation tax backs these bonds. The bonds issued to finance the U.S. Route 28 Project raised $160.7 million (net of financing costs of $14.6 million) in two sales in 1988 and 2002. An act of the General Assembly was necessary to authorize each of these issues.

The VRA has issued many series of bonds to finance loans to local government-run public utilities. At the close of FY 2002, $769.466 million of these bonds were outstanding, of

which $25.640 million were payable in the current year.[208] VPA has also, on several occasions, received authorization from the General Assembly to issue bonds.

The outlook for a new Commonwealth bond issue is ambiguous. When the first issue of U.S. Route 58 bonds was sold in 1989, the term of the bonds was 30 years and they paid a return of 6.96 percent. By way of comparison, the 30-year U.S. Treasury bonds auctioned in February, May, August, and November of that year had effective yields between 9.11 percent (May) and 7.87 percent (November).[209] When the last issue of U.S. Route 58 bonds was sold in 2002, the term of the bonds was 25 years and they paid a return of 4.87 percent. By comparison, the 30-year U.S. Treasury bonds auctioned in February, August, and November of 2001 had effective yields ranging from 5.520 percent (August) to 3.465 percent (November). Although the U.S. Treasury has sold no 30-year bonds since 2001, long-term interest rates seem to be lower now than they were even in 2001. This would imply that Virginia could borrow money at an interest rate even lower than 4.87 percent. On the other hand, Moody's Investors Service recently placed Virginia on its watch list because of "fiscal pressures brought on by a weak economy and a significant revenue shortfall."[210] If the Commonwealth's triple-A rating were reduced, the rate at which it could borrow would rise.

Whether the debt that a new rail authority issued must be, or ought to be, backed by the full faith and credit of the Commonwealth is an issue that the General Assembly would have to address. The Commonwealth's credit would enable the new authority to raise money on more favorable terms, for example, a lower interest rate. However, a bond issue backed by the state would count against the state's debt limit, and it might affect the state's credit rating (thus impairing the Commonwealth's capacity to borrow for other purposes).

How Can an Organ of the Commonwealth Involve Itself in the Rail Transport Sector?

Loan Guarantees

As noted previously, under the provisions of TEA-21 the railroad rehabilitation and improvement financing program is specifically intended to make loans to properties that receive a loan guarantee from a state or local government. This mode of involvement is unquestionably feasible. As also noted previously, its impact would be expected to be small.

The VRA makes loans to localities from the revolving funds established for that purpose by the Commonwealth. The majority of these loans go to the public utilities sector of the economy: water, sewer, or solid waste disposal. A fraction goes to airports.

Grants

The VRA, which is one of the organizations that were studied as in-state models, disburses some money to local utility authorities in the form of grants. As was noted in the section on revenue options, if it funds improvements to the property of a private company, the Commonwealth is bound by the state constitution to take a partial interest in that property.

Direct Subsidies

The Commonwealth does not now directly subsidize any activities of the railroads. By offering to share the cost of capital projects that it judged to be especially beneficial to the public, a rail agency could, in theory, create an incentive for the railroads to move those projects to the top of their list of priorities. Whether such a subsidy would cause the railroads to direct more of *their* resources to those selected improvements, or fewer, is not known.

***Quid Pro Quo* with Railroad Companies**

Negotiations between the Virginia Railway Express and CSX have been concerned with the possibility of making selected upgrades to CSX-owned track at state expense in exchange for CSX's permission for Virginia Railway Express to run more commuter trains on the improved rail line. More negotiations of this type could no doubt be initiated concerning other potential passenger corridors. It is less clear whether this approach could be used to promote improvements in freight transport.

Purchase and Operation of Track and Facilities

A few of the agencies identified in other states have exercised the power to purchase and operate railroad assets. In the case of West Virginia, the agency's action was motivated by the threat that the end of rail service in the 1990s posed to certain of the state's economically depressed eastern counties.[211] In the case of North Carolina, a corporation wholly owned by the state has owned and operated rail lines since before the Civil War.[212]

The West Virginia SRA owns and operates the 56-mile South Branch Railroad and is in the process of buying and repairing the 100-plus-mile West Virginia Central Railroad. Cindy Butler, an officer of the authority, made it clear that the West Virginia legislature sees the authority as an agent of economic development, and that the authority measures its success by the economic prosperity of the eastern counties that the South Branch Railroad serves.[213]

The NCRRC owns and maintains land, facilities, and 317 miles of track, which it leases to Norfolk Southern. At the time of its charter in 1849, the company was seen primarily as an engine of economic development.

This approach requires a substantial up-front investment of public resources. The West Virginia SRA is spending millions of state dollars per year on acquisitions and improvements as it rehabilitates miles of disused rail line. The NCRRC relied on "state and private subscriptions" to build its first 900 miles of track from 1849 to 1861. For perspective, when the Virginia Department of Taxation assessed the value of the locomotives and cars of the railroads that operate in Virginia, for the purpose of calculating the 2002 rolling stock tax, it valued them at $540,635,467.[214] When the same department published its 2003 statement of the real estate and

tangible personal property of the railroads, for the use of local government property tax collectors, it valued these assets at $1.315 billion.[215] This latter valuation may be compared with the estimated cost of the physical improvements that Norfolk Southern's engineering staff calculated would be necessary to provide additional capacity and increased operating speed on the Norfolk Southern lines in the I-81 corridor: $1.2 billion in Virginia and $2.3 billion in the whole corridor.[216]

The Administrative Cost of Each of These Modes of Involvement

Without a doubt the Virginia General Assembly will have to front some money to cover the administrative expenses of any agency it creates. The pattern apparent in the answers to the first question suggests that the General Assembly will most likely have to make a continuing commitment of resources.

The administrative costs of many of the state rail agencies that were surveyed fell within a fairly narrow range from $500,000 to $1 million. The director of the Ohio Rail Development Commission reported that the commission employs about 19 people, of whom 7 deal with rail planning and economic development and 12 with rail safety. It spends about $1 million per year on salaries, rent, office supplies, and so forth.[217] A representative of the West Virginia SRA reported that the SRA has 4.5 full-time equivalents (FTEs) and spends between $425,000 and $450,000 on salaries and utilities and office supplies.[218] The SRA owns its single office building (valued on its books at $499,700 as of June 30, 2002).[219] The *2000 Annual Report* of New York's Southern Tier West Regional Planning and Development Board indicates that the board spent $406,635 on payroll and benefits and $536,084 on program operations, a total of $942,719.[220]

VRA's *2002 Annual Report* indicates that that agency paid $839,000 for "personal services" [the same line item was labeled "salaries and benefits" in the 2001 report], $191,000 for "contractual services" ["professional fees" in 2001], and $456,000 for "general operating expenses," for a total of $1.486 million. For this administrative effort, the VRA managed total assets of $1.578 billion, and made grants totaling $18.503 million to local governments in the Commonwealth.[221]

The West Virginia SRA, which maintains track and operates trains, has in addition to its administrative expenses a large operating budget and a large capital budget. The 56-mile South Branch Railroad, which SRA owns and runs, has another 17.5 FTEs in operations. On the other side of the ledger, the South Branch Railroad earns $1.5 million in revenue each year from carrying freight. SRA also spent $2,478,431 (55% of its total budget in 2002) to purchase assets of the West Virginia Central Railroad (the legislature allocated $3 million of Lottery Bond revenue for this purpose). Each year SRA receives $2 to 3 million in state funds for rehabilitation of the track it has purchased.[222] The agency, which is currently investing heavily in upgrades and flood repairs to old track, would not be able to maintain liquidity without the state's generous fiscal support.

The NCRRC, which merely maintains the lines it owns and leases them to Norfolk Southern, also has higher administrative expenses. In its *2002 Annual Report*, the Statement of Operations shows expenses totaling $1.841 million, of which $747,758 went to salaries and administrative expenses and $291,993 to professional fees and contracted services. The Statement of Cash Flows shows outlays of $2.590 million for purchases of property and equipment and $15.337 million for capital projects. To support these outlays, NCRRC had income of $13.120 million, of which $12.771 million was lease income.[223] NCRRC has enough lease income to be a viable concern.

What Institutional Structure Would Best Suit a Commonwealth Organ Whose Purpose Is to Mobilize Capital for Rail Investment?

To infer what institutional structure is best suited to a rail authority of the sort proposed, the best approach is to examine the performance of the rail authorities in other states and also the functioning of the DRPT, the VPA, and the VRA in Virginia that carry *some* similar responsibilities in other transport or utility sectors. To evaluate or compare the effectiveness of the various institutional structures that exist in Virginia and in other states is not straightforward, however. The publicly stated mission varies from one rail authority to another. The financial and operating information that is available in public documents varies from one authority to another. In some cases, for example that of Florida, the rail authority's administrative staff cost is borne by the state DOT.

Despite the difficulties, it is possible to make some generalizations about what works. One apparently favorable institutional feature is a narrow programmatic focus. Another apparently favorable feature is some degree of political and financial independence. There is some evidence from the survey of agencies in Virginia and other states that an agency that has a narrow programmatic focus is more likely to achieve its program. For example, VPA is judged by whether it attracts business to the Port of Virginia. Other achievements may be credited to VPA: it has, for instance, persuaded a number of companies to build distribution centers in Virginia. But these achievements were incidental to the goal, which it has fulfilled, of attracting shipping to the port.[224] The Alameda Corridor Transportation Authority was created for the purpose of building a "consolidated transportation corridor" from the ports of Los Angeles and Long Beach to central Los Angeles. In the course of negotiating the agreements it needed to do this, the authority constructed a few attractive parks in depressed residential and commercial sections of Los Angeles, but these benefits were incidental to the goal, which it achieved, of building a new rail corridor. One might reason that where distracting secondary goals are absent and an agency's degree of success in meeting its goal is therefore readily observable, the agency is better able to succeed.

There is evidence that some measure of financial independence would make a rail agency more effective. The director of the VPA asserted that the authority's large degree of independence from state procurement procedures, travel regulations, and so forth was important to its ability to meet the needs of customers and the threat of competition. He offered as examples the sporadic, somewhat unpredictable need to dredge the channels, and the considerable amount that VPA spends on travel in order to promote itself overseas.[225] A former

employee of the NCRRC opined that, were it not for that company's independent existence as a corporation, the North Carolina legislature would almost certainly have raided its cash reserves in times of fiscal crisis to the detriment of the rail infrastructure.[226] (The Virginia General Assembly, in search of cash, has in fact borrowed money from the state's "dedicated" TTF.)

There is somewhat conflicting evidence as to whether a rail authority ought to be insulated from political winds. On the one hand, the director of VPA expressed a belief that the governors of Virginia have done well to fill the authority's board of directors mostly with business people who have no political agenda.[227] On the other hand, the director of the Ohio Rail Development Commission, which regards transportation planning as a major focus, asserted that his agency's effectiveness results in part from its involvement in the political process. By having a "seat at the table" on local and state commissions, the ORDC is in a position to make sure that multimodal planning is coordinated, rather than competitive.[228]

What Other Policy Initiatives of the Commonwealth May Affect Indirectly the Purposes Envisioned for the Virginia Rail Transportation Development Authority?

Other policy initiatives that are either underway or under discussion in Virginia could promote indirectly the objectives that a rail authority might pursue. Among the initiatives that could have a large effect are changes in the highway user fee structure; the construction or expansion of intermodal freight terminals in or near Virginia; and the quantity of investment in complementary transport modes, such as port facilities, or in competing transport modes, especially highways. None of these initiatives would directly attract investment to rail transport. They would affect the quantity of freight that shippers want to move, and they would influence shippers' choice between trains and trucks.

Change in Highway User Fee Structure

A change in the highway user fee structure, if it tended to increase the cost of truck transport, would promote the goal of diverting freight traffic from highway to rail as stated in S. 1279. This subject has received attention in the General Assembly within the past decade. Senate Document No. 49 of 1994 is the *Report of the Select Committee to Review the Findings and Recommendations of the Virginia Department of Transportation Concerning the Sufficiency and Distribution of Funds in the Transportation Trust Fund*.[229] This report summarized and discussed the findings of a series of reports that staff of VDOT, the Department of Taxation, the Department of Motor Vehicles, the State Corporation Commission, and the Joint Legislative Audit and Review Commission produced between 1990 and 1993. Two of the reports were concerned with vehicle cost responsibility (Senate Document No. 26 of 1991 and Senate Document No. 30 of 1992). The first of these found that the taxes and fees paid by passenger vehicles were covering 106 percent of the costs that passenger vehicles imposed on the transportation system, while buses were covering 30 percent of their own costs, light trucks 70 percent, single trucks 85 percent, and combination trucks 93 percent.[230] The second report confirmed the conclusions of the first.[231]

The Oregon DOT collects road user fees from trucks primarily in the form of a "weight-mile tax." Under the Oregon system, heavy vehicles in general pay the weight-mile tax, whereas light vehicles pay a fuel tax. The amount of tax liability that a truck generates is a function of its weight multiplied by the distance it travels on the state's roads. There are several exemptions for vehicles employed in farming, school transport, government service, public transit, and certain other activities.[232] In the 1999-2001 biennium, ODOT collected $454 million in revenue from the weight-mile tax. For purposes of reference, daily VMT in 2001 were estimated to be 57,086 and 158,816 in Oregon and Virginia, respectively—i.e., a similar tax in Virginia would probably collect almost three times as much. Although four other states also collect a weight-mile tax, only Oregon relies on it as the principal instrument for collecting revenues from truckers.

The weight-mile tax has been the subject of prolonged debate and parliamentary maneuver in the Oregon legislature.[233] The American Trucking Association is steadfastly opposed to the weight-mile tax. The American Automobile Association favors it. While the opposition prefers to focus attention on the burden of the weight-mile tax's administrative requirements, both sides agree that the tax results in a relatively heavier revenue burden on trucks in comparison with the burden on passenger vehicles. A change in the highway user fee structure, along the lines of the model in Oregon, could therefore promote the goal of diverting freight traffic from highway to rail.

Investment in Complementary or Competing Transport Modes

The debated expansion of the facilities at the Port of Virginia would inevitably create an increased demand for freight transport from the port to distribution points in Virginia, North Carolina, and Maryland. This would apply whether the expansion were a private marine terminal, such as the one proposed by the Mærsk shipping line, or an addition to the facilities that VPA owns and operates. The highways that serve Hampton Roads could carry at least part of the consequent increase in freight traffic if their capacity were expanded. A glance at the Official State Transportation Map identifies U.S. Routes 17, 58, and 460, and I-64 as the principal motor routes to and from the Port of Virginia. On the other hand, the rail lines that serve Hampton Roads could also carry at least part of the increase in freight traffic if their capacity were expanded. A glance at the Official State Railroad Map identifies the CSX line to Richmond, the Norfolk Southern line to Petersburg, and the CSX line into North Carolina as the principal rail lines to and from the Port of Virginia. In short, the expansion of the port facilities could have a positive impact on the demand for rail freight transport, whereas a concomitant expansion of the highway net serving Hampton Roads could mitigate that impact.

The future of rail transport in the I-81 corridor is understood to be involved in the public debates currently surrounding the public-private proposals that VDOT received from the Fluor Virginia and Star Solutions consortia. The nature of the improvements that are made to I-81, and the conditions attached, will have an impact on the demand for rail freight transport in that corridor.

OPTIONS AND ALTERNATIVES FOR THE VIRGINIA RAIL TRANSPORTATION DEVELOPMENT AUTHORITY: TASK 4 RESULTS

Introduction

The fourth task specified in SJR 354 is to "recommend the appropriate structure, powers, and duties of the Authority, and revenue and sources of revenue needed to perform its responsibilities." Before addressing the specific results of this task, it is important to reiterate the rationale that supports the creation of the Virginia Rail Transportation Development Authority.

The following argument is found in SJR 354:

- "Improvement and expansion of rail freight and passenger infrastructure and facilities in Virginia can reduce the need for expenditures on highway construction and maintenance by diverting both freight and passenger traffic from highway to rail."

- "The diversion of passenger and freight traffic from highway to rail reduces congestion, promotes safety, and avoids significant air and water pollution."

- "The freight railroads that currently own and operate most of the rail lines in Virginia do not have the financial resources to make many of the improvements to rail facilities and infrastructure that might clearly be in the public interest."

- Therefore, "the Virginia Rail Transportation Development Authority is required, pursuant to SB 1279 (2003), to 'finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment, or infrastructure.' "

It might be best to qualify this somewhat in view of the information provided in AASHTO's *Freight-Rail Bottom Line Report* quoted earlier in this report (especially the section entitled "The State of Freight Rail Today") so that it is clear that the diversion of truck traffic from highways with its attendant benefits (such as reduced congestion, increased safety, reduced pollution, etc.) is contingent on the rail industry being healthy and able to carry an increasing volume of freight during the coming years, in which significant growth in the need for freight services is projected to take place. It seems clear that the investments in rail infrastructure designed to keep the rail industry healthy and competitive must be sufficient to do just that. Funding that is inadequate to help the rail industry increase the volume of freight it carries during the next 20 years of growth will not usher in the benefits desired.

Insights from the Survey of Other States

It was hoped that the survey of rail entities in other states would provide suggestions for the structure, powers, and duties of Virginia's new rail authority. However, the survey did not turn up anything that unambiguously points to specific "appropriate" structures, powers, or duties for an authority, although there are structures, powers, and duties common to many of the entities investigated.

The survey is replete with ideas about the way an authority *could* be structured; however, one would be hard-pressed to derive a general rule about the "appropriate" structure of a rail authority from the results of the survey. The rail entities investigated have a variety of goals and a variety of organizational structures designed to make meeting their goals possible. All of them have to try to succeed in the political, economic, and social environment in which they exist. The research team looked at the enabling legislation of these entities and the powers created by the legislation. The research team tried to assess the success of each entity, but this proved very difficult to do. The team had hoped (for example) to be able to compare the financial statements of the entities to help determine whether each was a financial success. Originally, it was thought that a few standard measures of financial success would be found in each entity's financial statements to allow a comparison; however, this proved not to be the case. It was nearly impossible to evaluate and compare the financial information that was accessible. Part of the problem in a couple of cases was that the rail entities were not independent. Their administrative and operating expenses were hidden in the larger organization of which they were a part. Sometimes the rail entity was independent but the members of the staff were actually a part of another organization (such as a DOT). So, in the end, the research team was frustrated in its efforts to find a straightforward, simple, and illuminating way of comparing the entities. In particular cases, the success seems obvious, for example, the Alameda Corridor. In other cases, it is not so easy to tell. If an entity's own measure of success is keeping a rail line in operation that would otherwise have been closed, it might consider itself a success even though it is losing large sums of money every year. So, one of the consequences of the structural differences among many of the authorities (and the difficulty with evaluating and comparing them) is that it is very difficult to provide anything like a template for a well-constructed authority. (However a long list of considerations that one might want to consider when trying to set up an authority is provided in Appendix E.)

Revenues and the Financial Powers of the New Authority

The research team has assumed that bonding powers are critical to the success of the new authority in order to achieve such goals as have been proposed for it. The full range of duties that may eventually fall within the range of responsibilities of this new authority is not fully spelled out in SB 1279; however, the bill is clear about at least one of the principal purposes of the authority: The authority is "to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth . . . ." The power to issue bonds would allow the new authority to have a greater impact in carrying out this purpose in a shorter period of time. However, it would be essential for

the authority to have a reliable source of income to back the bonds. Senator Edwards expressed the view (in his speech in support of SB 1279) that a 'surcharge' on freight will provide the needed income. Whether a surcharge will be sufficient to back any bonds issued to finance improvements to rail infrastructure will depend on whether the trucking companies find it financially attractive to put their trucks on trains. Whether the trucking companies use the trains will depend on whether there are intermodal terminals at locations that make it economically desirable to put their trucks on trains. Presumably, the trucking companies will put their trucks on trains as long as they save money by doing so—and as long as this does not significantly increase their delivery times.

A discussion of the available sources of revenue for the new rail authority appears in the immediately preceding section: "Financial Issues: Tasks 1 and 3 Results."

Is the Virginia Port Authority a Suitable Model?

The research team was repeatedly advised by a variety of individuals to examine the possibility that VPA would serve as an appropriate model for the Virginia Rail Transportation Development Authority. The view that the VPA provides an excellent model for the new authority is clearly articulated by the Virginia High Speed Rail Development Committee:

> A Virginia Rail Authority ("VRA") is going to be an essential structural and operational element in any successful, comprehensive, state rail development program. A properly structured, staffed and funded VRA could conceivably get the job done in less time, and with better results, than would any other approach that might be taken.
>
> Nowhere in the transportation-related experience of the Commonwealth does a better model emerge for VRA than is presented by the Virginia Port Authority (VPA).
>
> The parallels are strikingly similar. As we understand it, 40 or more years ago, the ports of Virginia were not competitive, were handicapped by fragmented ownership and control of critical facilities, which were in poor—and declining—condition, were inefficient, and were generally not in a position to respond to revolutionary changes then in the making relative to the handling of international commerce (the shift from break bulk to container shipping), and were not contributing to the overall economic growth of the Commonwealth to the extent that they might have.
>
> VPA has, by all accounts, been a tremendous success. While it is true that the State of Virginia has invested millions of dollars in its port system, through VPA, this cumulative capital investment has now resulted in a world-class port system, which is much less dependent upon public financial support than earlier, due to the success of the commitment and continuity of the Commonwealth's policy of encouraging, and facilitating, the development of maritime commerce through VPA. This is exactly what Virginia needs for the rail mode, if rail is truly to become the powerful economic multiplier that it has the potential to become.[234]

Questions about the appropriate structure and powers of the new rail authority are affected by the question whether it is to be 'independent' in the way the VPA is. Is it to be set up as autonomous and function like a business, or is it to be created as a government agency? The new rail authority's independence would be created in the enabling legislation along with the structure and powers appropriate to an organization that is to be independent of government

control. If the rail authority were independent, this would also affect the range of possible sources of revenue.

The research team feels that the history of the emergence of the VPA from government control is instructive and directly relevant to questions concerning the "appropriate" structure, powers, and duties of the proposed rail authority.

A Brief History of the Virginia Port Authority

The Commonwealth did not take an active role in the Port of Virginia until the establishment of the Hampton Roads Port Commission in 1922. This was strictly an advisory body with no enforcement powers.

In 1926, the General Assembly abolished the Hampton Roads Port Commission and established the State Port Authority of Virginia. This agency was governed by a five-member board of commissioners appointed by the governor. It was empowered to issue permits for construction, extension, and alteration of terminal facilities and for the maintenance of such facilities. It was also given the power to prevent obstructions to navigation and the pollution of waters; to supervise dredging; and to regulate anchorage, berthing, and moorage of vessels.

As a result of the reorganization of the executive branch of state government in 1948, the State Port Authority of Virginia was reconstituted the Division of Ports within the Department of Conservation and Development.

In 1950, the Governor and General Assembly established the Commission to Study the Reorganization of the Division of Ports. This commission was known as the Roberts Commission, and it found that "the ports which are showing the greatest development and are holding or attracting additional tonnage . . . are those which have been recognized by their state governments as having a vast potential and are aided by state funds under the supervision of autonomous state authorities."[235] The report criticized state government's lack of awareness and appreciation "of the value of and necessity for the development of this great asset ….."[236] The report also stated that "it is difficult to imagine that the Legislature of Virginia will not be anxious, by similar businesslike and proven methods, timely recognition and adequate appropriation . . . to aid in the development of its great ports . . . ."[237] The commission recommended that the legislature "establish the Division of Ports as an independent agency of government," and it justified this recommendation in the following way: "Its independent status, with authority reposed in its Board of Commissioners to execute its plans, will give it prestige not now enjoyed in competition with other port authorities of this and foreign countries. There is no economy in keeping an important agency, such as this, under the canopy . . . of any state agency whose duties and interests are not altogether related to port development."[238] This commission also argued

- That the port authority should be under the direct supervision of citizens of the Commonwealth, who would be appointed by the Governor and confirmed by the

General Assembly, and that it should have the authority necessary "to carry out broad plans and objectives within the law."[239]

- That it had been a mistake to place the port authority under a state agency that did not "understand the fast moving, highly competitive, ever-changing business environment in which a port authority must operate."[240]

- That "any port authority must have a wide range of flexibility to be able to respond to the present situation."[241]

In 1952, the Virginia State Ports Authority was established. This authority had the power to acquire real property. Although this authority was given the task of unifying and improving the Port of Virginia, it was not given an appropriation or a source of income equal to this task. An attempt was made to correct this oversight when the General Assembly empowered the authority "to issue revenue bonds for the acquisition, construction, reconstruction, or control of harbors, seaports and facilities used in connection therewith."[242] However, the bonds were limited to an interest rate of "not over five percent."[243]

In 1955, a consultant to the Virginia Advisory Legislative Council stated "It would be desirable to have a continuing source of income [for the port authority] in order to . . . permit a more stable scheduling of long-range plans of port development and permit the Authority to operate with freedom of action inherent in a corporation."[244]

In 1958, HJR 70 made note of the competition between the Port of Virginia and other state-supported ports. The General Assembly gave the VPA (1) the specific power "to issue revenue bonds in order to acquire, construct, equip, maintain, develop, and improve harbors and port facilities" and (2) "more flexibility, including the power to impose and collect charges for the use of port facilities, and to create a sinking fund for bond payment."[245] The bonds were also made more marketable by increasing the maximum interest rate to 6 percent. Also, for the first time, the General Assembly appropriated specific funds for acquiring, developing, and operating port facilities. Previously, appropriations had been only for administrative and advertising costs.

In 1969, the state government initiated another study of the VPA. It is often referred to as the Breeden Commission. At this time, the major maritime communities in Hampton Roads had port authorities of their own. These municipal agencies had been created by the General Assembly over a period of years to aid the port cities in the development of their public general cargo facilities and related industrial growth. The Breeden Commission recommended that "one single ports authority should be created which will direct, develop, control, plan and regulate the activities of the deep water ports of Virginia and will derive its authority from the Virginia General Assembly." The commission also recommended that "[i]ndependent municipal port agencies should be eliminated from the Virginia Ports structure and the port functions of these absorbed by a unified agency."[246] These recommendations mark the beginning of the unification of the ports of Virginia.

The *Governor's Management Study Survey and Recommendations* was published in 1970. This study covered Virginia's governmental organization and functions. It stated that the

VPA should operate "as a successful business enterprise" and that it "must be operated as an autonomous operation."[247] These recommendations brought to the forefront the recurring and important theme of the relationship between the VPA and its operating environment: if the VPA were to be managed as an independent agency, it would be necessary to give it wider financial and operational prerogatives. This report reiterates the findings of the Roberts Commission and the Breeden Commission: In order to function in a business environment, the VPA should have the maximum flexibility and freedom of action to deal with the fast moving enterprise of port management by being free of the restrictions imposed by the rigid governmental way of doing things.

In 1970, the General Assembly changed the name of the Virginia State Ports Authority to the Virginia Port Authority. The VPA's governing board of commissioners was enlarged from seven to eleven members. Other amendments placed emphasis on the consolidation of several port terminals and authorized the VPA to acquire port facilities from political subdivisions. Steps were initiated to "seek to effect consolidation of the water terminals of the several cities within the ports of this State and their administration, and to promote a spirit of cooperation among these cities in the interest of the ports as a whole."[248] It was also important that at this time the General Assembly appropriated funds for the VPA to carry out this mission, which came to be known as the "unification" of the ports of Virginia.

In 1971, the Virginia State Chamber of Commerce formed a task force, which paralleled the Governor's Management Study. This task force reiterated the recommendation of previous studies: The state should allow the VPA to operate as a successful business enterprise. The members of the task force stated: "It is our belief that the Virginia Port Authority, if properly funded and operated as an autonomous businesslike organization, could return untold economic benefits to the citizens of Virginia."[249]

During the 1978 Session of the General Assembly, SJR 6 created the Virginia Ports and Port Authority Study Commission. This commission, which was sometimes referred to as the Babalas Commission (after Senator Babalas, who was the chairman), was given the task of studying "all matters relating to the Ports of Virginia, the Virginia Port Authority, and in particular, the many questions raised about the relationship of the ports to the Port Authority . . . ."[250]

The Babalas Commission study was concluded by the introduction of SB 548 in the 1981 Session of the General Assembly. The recommendations of the commission were reflected in this bill. The commission recommended that the VPA's enabling legislation be revised. The revision would provide the VPA with the right to gather, maintain, and use proprietary information and prohibit its disclosure; to limit the length of terms of office members of the VPA's board of commissioners to two consecutive five-year terms; to subordinate local authorities to the VPA; to consolidate state-owned marine terminal operations; to compile the terminal operating tariff; and to acquire property owned by federal, state, or local governments and private individuals for the purpose of constructing, maintaining, and operating port facilities in Virginia. SB 548 incorporated most of the recommendations of previous studies, and it essentially constituted a mandate for the VPA to complete unification of the terminals as soon as possible.

In 1982, the VPA's board of commissioners authorized the establishment of Virginia International Terminals, Inc. (VIT), to operate and manage Norfolk International Terminals and Newport News Marine Terminal.

In 1983, VIT assumed operational control of Portsmouth Marine Terminal; as a consequence, all of the general cargo terminals within the Hampton Roads harbor region were fully unified under the single ownership of the VPA and the single operational control of VIT.

The Director of VPA emphasized in an interview with the research team that the unification of the ports "made all the difference in the world" to the success of the VPA.[251] He felt that the unification of all the ports under the VPA and the provision of full operational control to the VPA were essential to the growth of the Port of Virginia from the sixth largest general cargo port on the East Coast in the early 1980s (with a little more than 2 million tons of cargo) to the second largest by 1993 (with almost 7.6 million tons of general cargo).

He pointed out several other factors that contributed to the VPA's success:

- He said that at one time, there was no good reason to bring a ship to the Port of Virginia because (1) Virginia was not a large consuming state; (2) Virginia was not a large manufacturing state; and (3) there were no large distribution centers near the port. The VPA worked with a variety of state officials to bring distribution centers to the area around the ports. Their continuing success at attracting distribution centers has been a significant factor in the success of the VPA.

- He strongly emphasized that "if you're going to do what we do, you need to be a business, not a political organization." He strongly felt that the more independence the proposed rail authority had from the government, the better off it would be. Another related factor that he felt had contributed greatly to the success of the VPA was the fact that Virginia's governors had always provided 'good business' boards of commissioners and not political boards.

- The creation of VIT, Inc., to operate and manage the terminals has been another factor in the success of the VPA. The creation of a corporation to operate the terminals (which was allowed by the enabling legislation) has made it possible for the VPA to negotiate with organized labor, which is something it otherwise would not have been able to do.

The Usefulness of the VPA as a Model for Virginia's New Rail Authority

The history of the VPA presented is significant in that it focuses almost entirely on the importance of the VPA's progressively increasing independence from government control and the unification of the ports as the most important factors in its success. These aspects of the VPA's success have been emphasized because they are relevant to the question of whether the VPA should serve as a model for the new rail authority. (The reader should bear in mind that the word *independent* is used here to mean *independent in the way that VPA is independent from the*

government.) As mentioned previously, the VPA's director emphasized that "if you're going to do what we do, then you need to be a business, not a political organization."

This puts the emphasis squarely on the question of whether the operations of the Virginia Rail Transportation Development Authority are going to be sufficiently similar to those of the VPA that it *needs* to be independent of the government and *needs* to function like a "business" rather than a "political organization." If, in order to achieve its goals, it needs to function like a business, then the history of the VPA is instructive. Taking the VPA as a model could be instrumental in setting the new authority on the right path from the beginning.

Three Options Concerning the Structure and Powers of the New Authority

All of the findings of the research conducted in this study led the research team to conclude that there exist three options for the structure and powers of Virginia's new rail authority:

- *Option 1: Create an Independent Rail Authority with Bonding Powers.*
- *Option 2: Create a New Rail Agency within the Government with Bonding Powers.*
- *Option 3: Do Not Create a New Authority or a New Agency: Give Bonding Powers to the DRPT.*

These options are considered here.

Option 1: Create an Independent Rail Authority with Bonding Powers

What lessons can be learned from the history of the VPA? As is obvious from the short history presented, the need for independence from the government to be able to function in a business environment is a constantly recurring theme in most of the studies of the VPA and its predecessors throughout its history.

In 1950, the Roberts Commission found that "the ports *which are showing the greatest development and are holding or attracting additional tonnage* . . . are those which have been recognized by their state governments as having a vast potential and *are aided by state funds under the supervision of autonomous state authorities* [emphasis added]."[252]

There is a recurring theme of the importance of autonomy from the government if the authority is to be able to function efficiently in its environment:

- "any authority must have a wide range of flexibility to be able to respond to the present situation" [1950].[253]

- The VPA should operate "as a successful business enterprise," and it "must be operated as an autonomous operation." "In order to function in a business environment, the Port Authority should have the maximum flexibility and freedom of action to deal with the fast moving enterprise of port management by being free of the restrictions imposed by the rigid governmental way of doing things" [1970].[254]

- "It is our belief that the Virginia Port Authority, if properly funded and operated as an autonomous businesslike organization, could return untold economic benefits to the citizens of Virginia" [1971].[255]

So, in thinking about "appropriate" structures, powers, and duties of the proposed rail authority, it would be reasonable to suggest that the VPA provides at the very least a model for some general characteristics: It is autonomous/independent; it functions as a business rather than a government agency and has a businesslike structure and organization; it has the power to issue revenue bonds; it has the power to create corporations to carry out some of its functions; and it has the power to purchase property, to set prices for services, to use its income for VPA purposes, and to promote the services of the VPA and solicit new customers.

It would be reasonable to assume that the proposed rail authority would benefit from a similar array of powers and from having an independent status; however, it must be said that the new rail authority could be sufficiently different from the VPA that reasonable doubts could be raised about the need to make it an independent authority. One difference is that the VPA owns all of its facilities. The VPA's customers want to use its facilities, and they are willing to pay for that privilege. This, of course, provides the VPA with a significant source of income. If the rail authority, on the other hand, did not own the infrastructure, it would not be able to charge fees for its use. Senator Edward's plan is to place a surcharge on the freight. However, if the VPA model were accepted as appropriate, then owning the infrastructure would be a desirable goal for the new rail authority. In that case, the authority would have something that customers would want to use, and this would provide the authority with a source of income.

Option 2: Create a New Rail Agency within the Government with Bonding Powers

Part of the problem with using the VPA as a model is that it is not entirely clear just how significant its "autonomy" is in its success. Clearly, autonomy is *one* of the most important factors in VPA's success. The skills of its director also may have greatly contributed to its success as well as its success in attracting distribution centers to the immediate vicinity of the ports. Another important factor in VPA's success, according to its director, was the unification of the ports, which gave the VPA considerably more control over the operations of the ports. Again, there is nothing in the rail authority's world that would parallel unification—unless, that is, the authority were to buy the rail infrastructure.

However, the VPA is not the only model that needs to be considered. The research team came across an interesting example of a rail organization, the Ohio Rail Development Commission, that performs many of the functions that the new rail authority would be expected to perform—but from *within* the government.

The ORDC is an "agency of the state within the department of transportation."[256] Its purpose is to "develop, promote, and support safe, adequate, and efficient rail service throughout the state," "[m]aintain adequate programs of investigation, research, promotion, planning, and development for rail service," and "[p]rovide for the participation of private corporations or organizations and the public in the development, construction, operation, and maintenance of rail service, and as franchisees thereof."[257]

This ORDC has the power to "adopt, alter and repeal bylaws"; "adopt an official seal"; "maintain a principal office" and, if necessary, regional offices; "sue and be sued in its own name and plead and be impleaded in its own name"; "undertake . . . the acquisition, renovation, repair, refunding, operation, maintenance, or construction of any rail service project"; "establish and operate a revolving loan fund"; "issue bonds and notes and refunding obligations of the state"; "acquire by gift or purchase, hold, or dispose of real and personal property"; "make and enter into all contracts and agreements"; receive and accept grants from federal agencies; purchase insurance; "establish or increase reserves from moneys received"; "receive and disburse the proceeds" of bonds; make grants and provide consultation services to political subdivisions, transportation authorities, and other persons; "establish and amend the criteria and qualifications for the making of any loan"; and "do all acts necessary and proper to carry out the powers expressly granted to the commission."[258]

The DOT "may use all appropriate sources of revenue to assist the commission in developing and implementing rail service" but "all public funds acquired by the commission shall be used for developing, implementing, and regulating rail service and not for operating rail service unless the general assembly specifically approves" the expenditure of such funds.[259]

Members of the research team spoke with the Director of the ORDC by telephone on September 11, 2003. One of the most interesting aspects of the conversation was the fact that he thought that it was important that the ORDC was *not* separated from the government. He knew of the VPA and its successes, and he was aware that it functioned for the most part independently of the government, but he described a wide array of projects and successes that the commission has had, which were achieved without separation from the government. He suggested that it was important to jump right into the political fray of state government. For him, this is where the work takes place.

Option 3: Do Not Create a New Authority or a New Agency: Give Bonding Powers to the DRPT

The successes of the ORDC suggest an alternative to the establishment of a new rail authority: Provide bonding powers to a state rail organization that already exists—the DRPT.

Although providing bonding powers to the DRPT would be unique in contemporary state government in Virginia (no other state agency has debt authority), it would not be unconstitutional. Normally, all bonding is performed by independent or quasi-independent boards or authorities, such as the CTB or the VRA (which, by the way, is currently authorized to issue debt for heavy rail projects). To maintain the clarity of the distinctions among the three

options provided, the option that will be contrasted with the option of creating a new and independent authority in the following summary will be the option of providing the DRPT with bonding powers—even though the bonds the DRPT asks to be issued may in fact be issued by the CTB. What is important is that the DRPT would be determining what bonds needed to be issued.

A Summary of the Three Options for Creating the Authority

Here is a brief summary of the three options presented along with some of the arguments for and against each choice. The first decision that has to be made is whether to create an independent rail authority or a rail agency within the government. If it is decided to create a rail agency *within* the government, then it must be decided whether the creation of a new agency would be more appropriate than providing bonding powers to the DRPT. It is the position of the research team that the creation of a separate rail agency within the government is not a strong option because the DRPT already exists as a rail agency within the government. So, to a large extent, the research team sees the choice as one between the creation of an independent authority and the provision of bonding powers (and perhaps other needed powers) to the DRPT. Nevertheless, arguments in favor of the creation of a rail agency within the government that is separate from the DRPT are also provided.

The reader should bear in mind that the arguments presented in support of the creation of an independent rail authority also include arguments for and against the separation of rail from the DRPT. Likewise, the arguments in favor of the creation of a rail agency *within* the government are principally arrayed for and against its separation from the DRPT and the limitation of its focus solely to rail. Here are a few arguments in favor of and against each of the three options presented.

Option 1: Create an Independent Rail Authority with Bonding Powers

Pros

- It would have wider financial and operational prerogatives.
- Maximum flexibility and freedom of action.
- Freedom from restrictions imposed by the "rigid governmental way of doing things."
- It was once said of the VPA that if it were properly funded and operated as an autonomous businesslike organization, it "could return economic benefits to the citizens of Virginia." This may also be true of an independent rail authority.
- It would have the right to gain and use proprietary information and prohibit its disclosure.

- The authority would have the right to create corporations to carry out some of its functions. (This would make it possible to negotiate with organized labor, which would be important in dealing with railroads.)

- Would unify all rail efforts under the control of one organization.

- A unified authority would allow for comprehensive planning, priority setting, and coordinated repairs.

- The authority would be focused strictly on rail matters.

- The authority would provide an independent voice for rail transportation development.

- There is some evidence from the examination of authorities in other states that this narrow programmatic focus may enhance the efficiency of the organization.

- An independent authority would be less affected by political changes.

Cons

- Increased state expenditures as a result of the costs of setting up and maintaining a separate authority. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new authority would likely be between $500 thousand and $1 million a year. (This assumes that the rail section of the DRPT would remain in existence as a part of the DRPT. If, on the other hand, the rail section of the DRPT were moved to the new authority, then the extra costs of operating the new authority would be the difference between the costs of operating the rail section of the DRPT and the costs of operating the new authority.)

- Possible inefficiencies (i.e., other existing authorities such as the DRPT might be able to perform this task at lower cost and in a more efficient way by virtue of previous experience). By not using an existing organization that is familiar with rail, will lose at least some of its institutional experience.

- Unlike the VPA, the new rail authority might not own the rail facilities; as a consequence, it would not be able to generate revenue by charging for the use of the rail lines as VPA does for use of the port facilities.

- Unifying all rail matters under one authority may not have the importance that it had for the VPA, unless the intention is for the new authority to own the railroad infrastructure.

- Adds new agency; creates more bureaucracy.

- Diminishes the voice of the DRPT as a result of the fact that the DRPT would lose the railroad community, which is a key constituency.

- Would aggravate the competition between rail and transit for funds.

- The new authority will be focused solely on rail; consequently, it will lose the benefits of being part of the larger rail and public transportation community.

Option 2: Create a New Rail Agency with Bonding Powers Within the Government

Pros

- Would unify all rail efforts under the control of one organization.

- A unified agency would allow for comprehensive planning, priority setting, and coordinated repairs.

- The agency would be focused strictly on rail matters.

- The agency would provide an independent voice for rail transportation development.

- There is some evidence from the examination of authorities in other states that this narrow programmatic focus may enhance the efficiency of the organization.

Cons

- The cost of setting up and maintaining the new agency will be much greater than if the power to issue bonds is given to the DRPT. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new agency would likely be between $500 thousand and $1 million a year. (Again, this would be true as long as the rail section of the DRPT remained in operation and remained a part of the DRPT.)

- The DRPT already exists, so there would be no time lag as there would be if a new authority were being set up.

- The DRPT already has expertise in state rail matters.

- Possible inefficiencies (i.e., other existing authorities such as the DRPT might be able to perform this task at lower cost and in a more efficient way by virtue of previous experience). By not using an existing organization that is familiar with rail, will lose at least some of its institutional experience.

- Adds new agency; creates more bureaucracy.

- Diminishes the voice that the DRPT has as a result of the fact that it would lose the railroad community, which is a key constituency.

- Would aggravate the competition between rail and transit for funds.

- The new authority will be focused solely on rail; consequently, it will lose the benefits of being part of the larger rail and public transportation community.

Option 3: Do Not Create a New Authority or a New Agency: Give Bonding Powers to the DRPT

Pros

- The cost of setting up and maintaining the new authority will be much greater than if the power to issue bonds is given to the DRPT. Based on the evidence garnered from other state rail authorities, the yearly operating costs of a new authority would likely be between $500 thousand and $1 million a year. (Again, this would be true as long as the rail section of the DRPT remained in operation and remained a part of the DRPT.)

- The DRPT already exists, so there would be no time lag as there would be if a new authority were being set up.

- The DRPT has regular dealings with the railroads and an understanding of their respective positions, which would facilitate negotiations with them.

- The DRPT already has expertise in state rail matters.

- The DRPT has a good working relationship with national groups.

- The DRPT currently has the authority to withhold proprietary information from distribution.

- Current staff has a working relationship with the Federal Rail Administration and understands legislative programs and funding.

- Would unify all rail efforts under the control of one organization.

Cons

- The DRPT does not have certain negotiating rights, such as the ability to negotiate with unions; however, it can (and currently does) negotiate with railroads.

- Constrained by government administrative procedures.

- Would not have the wider financial and operational prerogatives that an independent agency would have.

- Would not have the right to create corporations to carry out some of its functions.

- Would be more affected by political changes.

CONSTITUTIONAL ISSUES

The wording of Article 10, Section 10, of the Constitution of Virginia seems to suggest that the creation of the Virginia Rail Transportation Development Authority to serve its intended purposes would be unconstitutional.

> Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

However, a University of Virginia law student on the staff of the Virginia Transportation Research Council has looked into this issue and has concluded that it would probably be acceptable to proceed with an authority devoted to financing or helping finance infrastructure improvements with public money. What follows is a brief summary of the legal issues. (Appendix D is a legal memorandum on this issue.)

The Virginia Supreme Court has held that the state can create a public authority so long as it meets two conditions. First, the authority must serve primarily a public purpose. Second, the state, in creating the authority, cannot exceed the limits placed on it by the constitution.

The first condition of this test is not difficult to satisfy insofar as the courts will defer to the General Assembly's determination that an authority serves a public purpose, unless, in the court's judgment, that determination bears no reasonable relationship to the public interest. Under that standard, reasonable doubt must be resolved in favor of the General Assembly's determination. This makes it extremely difficult for the court to overrule the General Assembly's judgment that a given act is for a public purpose.

Given the court's determinations in this area in the past, the creation of this authority would pass this first condition so long as the General Assembly makes a statement of purpose in its legislation. This is particularly true in light of the fact that a court would resolve reasonable doubt in favor of the constitutionality of the act.

The second condition of the test—that the state cannot exceed the limits of the constitution—is more complex and requires consideration of three clauses of the state constitution: the credit clause, the stock or obligations clause, and the internal improvements clause. It is certain that the creation of this authority would not violate the internal improvements

clause. However, with regard to the credit clause and the stock or obligations clause, there are arguments on both sides.

The Credit Clause

The credit clause of the constitution states that the credit of the state or "of any county, city, town or regional government" cannot be granted to any person, association, or corporation. The Virginia Supreme Court, in interpreting this clause, has held that if the state does not pledge its full faith and credit to the bonds of the authority, then it will not violate the credit clause. Thus, so long as the state chooses not to pledge its full faith and credit to the authority's bonds, this clause will not be implicated.

Even if the state chooses to pledge its full faith and credit, however, it is still likely that this would not violate the credit clause. The Virginia Supreme Court has repeatedly held that if the state acts with a primarily public purpose, then its action does not violate the credit clause—even if a private company benefits as well. Further, the supreme court has held that the courts, in determining that purpose, are obligated to defer to the stated purpose of the General Assembly and resolve all doubts in favor of the constitutionality of the act. Taken together, this makes it likely that the creation of the proposed authority would be ruled constitutional even if the state pledged its full faith and credit to the authority's bonds.

There is, however, a potential problem involving credit clause challenges. This problem is a concern only if the authority does not buy complete ownership of the tracks. While opinions of the Virginia Attorney General have declared that the state's actions will not violate the credit clause so long as it retains an ownership interest in the improvements it has made, this has never been decided in court. As a result, how a court would decide this issue is difficult, if not impossible, to predict.

A second troubling feature involves the General Assembly's declaration that the railroads cannot finance these improvements themselves. Senate Joint Resolution No. 354 states that "the freight railroads . . . do not have the financial resources to make improvements to rail facilities and infrastructure ….." If a court were willing to take this as a statement of fact, then one could construe the situation as one where the railroads would be obtaining something using the state's credit that they could not have obtained on their own. This could be unconstitutional in light of *Holstein v. Wise*. If this were the case, then the creation of this authority might be seen to violate the credit clause.

However, there are a number of ways that this argument may be found inadequate. First, so long as the authority raises the money independently, and does not pledge the full faith and credit of the state, then the state's credit would not be involved. This would mean that the railroads would not be obtaining anything on that credit, distinguishing this case from the rule enunciated in *Wise*. Second, the court may not accept the assertions of Senate Joint Resolution No. 354 as fact. The court may find that the railroad companies are capable of financing the project, but are unwilling to do so. Finally, the court could hold that *Wise* would not apply to the creation of a rail authority because *Wise* involved a county government's guarantee of payment. The creation of a rail authority would not necessarily involve guaranteed payments, and

particular emphasis could be given to the authority's structure in order to pass this particular constitutional requirement.

The Stock or Obligations Clause

The stock or obligations clause states that neither the state "nor any such unit of government [can] subscribe to or become interested in the stock or obligations of any company…for the purpose of aiding in the construction or maintenance of its work." Like the credit clause, however, the courts interpret this clause in light of the public purpose test. This test grants substantial deference to the General Assembly's determination of the purpose of the act. Thus, so long as the General Assembly declared that the authority's activities served a public purpose, then it probably would not violate this clause either.

However, a court could find that the act violates the clause. Although courts afford legislative acts the presumption of constitutionality and will only strike down a law if it "plainly exceeds constitutional limitations," they have also held that "[i]f the Constitution says something is not a proper government function, no amount of legislative language can make it so." Thus, in *Button v. Day*, the court held an act creating an authority that would guarantee the loans of corporations that moved to a certain area of the state violated the credit clause because the General Assembly was seeking to do literally what the constitution forbid (lending the credit of the commonwealth to a private corporation). This was true, the court said, even though it was clear that the motivating purpose of the act was to benefit the public.

Applied here, a court could hold that *Button* is controlling because the public purpose test applied to the credit clause is the same as is applied to the stock and obligations clause. Thus, the court could then say, what the General Assembly intends to do—provide funds to private railroad corporations to improve and maintain their rail lines—is, as in *Button*, exactly what the Constitution literally forbids insofar as the state is becoming interested in the stock or obligations of a company "for the purpose of aiding in the construction or maintenance" of the company's work. Drawing on *Button*, it could hold that it is immaterial that the state is aiding in the construction and maintenance of those rail lines in order to serve a public purpose because the legislature is attempting to do something that is explicitly forbidden, and in such cases the public purpose test does not apply.

Admittedly, this might be a bit of a stretch—the courts have never said that applications of the public purpose test to the credit clause are applicable to stock or obligations clause challenges. Nevertheless, it is a plausible argument.

The Internal Improvements Clause

The internal improvements clause states that the state cannot "become interested in any work of internal improvement, except public roads and public parks." The authority itself would not fall under the restrictions of this clause insofar as the clause applies only to the state and not to any of its political subdivisions.

If the state sought to provide its own funds through the authority, however, then it would fall under this section but would still probably pass constitutional muster because the courts have carved an exception to the internal improvements clause known as the governmental functions exception. This exception states that if the state's action is necessary and incidental to an essential government function, then it may engage in works of internal improvement without violating the clause. Further, in applying the exception, the courts have made clear that they will not pass judgment on the wisdom of the manner in which the government exercises its governmental functions but rather will only decide if the state's objective is constitutionally permissible.

The courts have also ruled repeatedly that the maintenance and construction of public roads is a government function. Here, the state's objective in creating this authority is to improve the rail lines in order to reduce congestion and pollution while improving safety on the state's roads. Thus, there is a very strong argument that its objective falls within the judicially recognized governmental function of maintaining the roads. And since the courts have made clear that they will only pass judgment on whether or not the action in question is incidental to a government function and not on how the General Assembly chooses to exercise that function, it is likely that the creation of this authority would not violate the internal improvements clause even if the General Assembly sought to contribute money directly.

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[1] This is a transcription of his speech from the floor of the Senate. February 4, 2003.

[2] Most of what follows is drawn directly from AASHTO's *Freight-Rail Bottom Line Report*, which was written by Cambridge Systematics and published in January 2003. It is a very important resource for up-to-date material on freight rail. What is presented here is a small portion of the information this report contains. For more detailed accounts of the issues covered here, see the original report, which is available online on the AASHTO website. The data used by this report are from the TRANSEARCH database, the USDOT *Freight Analysis Framework Project*, and the ENO Foundation in its *Transportation in America* series.

[3] Ibid., 19-22.

[4] Ibid., 27.

[5] Ibid., 27-28.

[6] Ibid., 28-29.

[7] Ibid., 29.

[8] Ibid., 30.

[9] Ibid., 35-36.

[10] Baseline freight forecasts presented in this section are based on TRANSEARCH data for the year 2000 and on interim growth rates developed under the ongoing FHWA Freight Analysis Framework Project.

[11] AASHTO, *Freight-Rail Bottom Line Report*, 50-51.

[12] Ibid., 51.

[13] Ibid., 52.

[14] Ibid., 52.

[15] Ibid., 57.

[16] Ibid., 58.

[17] Ibid., 58.

[18] Ibid., 58.

[19] Ibid., 59.

[20] Ibid., 59.

[21] Most of the following material on the Mid-Atlantic corridor and Virginia comes from the *Mid-Atlantic Rail Operations Study*, published by the I-95 Corridor Coalition in 2002.

[22] Ibid., 4-5.

[23] Ibid., 7-8.

[24] Ibid., 20.

[25] Ibid., 21.

[26] Ibid., 21-22.

[27] Md. Code. Ann. Transp. 7-201(2003).

[28] Md. Code. Ann. Transp. 7-208 (2003).

[29] Md. Code. Ann. Transp. 7-101(1) (2003).

[30] Md. Code. Ann. Transp. (k-l) (2003).

[31] Md. Code. Ann. Transp. 7-204(m-p) (2003).

[32] Md. Code. Ann. Transp. 7-208(b)(1-2) (2003).

[33] Md. Code. Ann. Transp. 7-505 (2003).

[34] NY Code. Ann. 2642-c.1 (McKinney 2003).

[35] NY Code. Ann. 2642-a.3 (McKinney 2003).

[36] NY Code. Ann. 2642-d.1 (McKinney 2003).

[37] NY Code. Ann. 2642-f.2 (McKinney 2003).

[38] NY Code. Ann. 2642-f.5 (McKinney 2003).

[39] NY Code. Ann. 2642-f.3-4 (McKinney 2003).

[40] NY Code. Ann. 2642-f.6 (McKinney 2003).

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[42] NY Code. Ann. 2642-f.7 (McKinney 2003).

[43] NY Code. Ann. 2642-h.1 (McKinney 2003).

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[45] Ohio Rev. Code. Ann. 4981.03 (A) (1-3). (West 2003)

[46] Ohio Rev. Code. Ann. 4981.14 (B) (1-18). (West 2003)

[47] Ohio Rev. Code Ann. 4981.02 (F-G) (West 2003).

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[49] Ohio Rev. Code Ann. 4981.032(West 2003).

[50] Ohio Rev. Code Ann. 4981.06 (West 2003).

[51] Ohio Rev. Code Ann. 4981.07 (A) (West 2003).

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[53] Ohio Rev. Code Ann. 4981.09 (West 2003).

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[55] Ohio Rev. Code Ann. 4981.091 (West 2003).

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[60] Ohio Rev. Code Ann. 4981.13 (West 2003).

[61] Ohio Rev. Code Ann. 4981.16 (A) (West 2003).

[62] Ohio Rev. Code Ann. 4981.20 (A) (West 2003).

[63] Ohio Rev. Code Ann. 4981.20 (B) (West 2003).

[64] Ohio Rev. Code Ann. 4981.28-9 (West 2003).

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[66] PA. STAT. ANN. tit. 55, § 696.2 (West 2003).

[67] PA. STAT. ANN. tit. 55, § 696.5 (West 2003).

[68] PA. STAT. ANN. tit. 55, § 696.4.d (West 2003).

[69] PA. STAT. ANN. tit. 55, § 696.4.a.1-2 (West 2003).

[70] PA. STAT. ANN. tit. 55, § 696.6.a.3-4 (West 2003).

[71] S.D. Codified Laws 49-16B-1 (Michie 2003).

[72] S.D. Codified Laws 49-16B-1 (Michie 2003).

[73] S.D. Codified Laws 49-16B-8-10, 46 (Michie 2003).

[74] S.D. Codified Laws 49-16B-13 (Michie 2003).

[75] S.D. Codified Laws 49-16B-26 (Michie 2003).

[76] S.D. Codified Laws 49-16B-29 (Michie 2003).

[77] S.D. Codified Laws 49-16B-13.1 (Michie 2003).

[78] S.D. Codified Laws 49-16B-14 (Michie 2003).

[79] S.D. Codified Laws 49-16B-22 (Michie 2003).

[80] West Virginia State Rail Authority Financial Statements 2002, 16.

[81] W. Va. Code 29-18-5 (Michie 2003).

[82] W. Va. Code 29-18-6 (Michie 2003).

[83] W. Va. Code 29-18-7 (Michie 2003).

[84] W. Va. Code 29-28-10 (Michie 2003).

[85] W. Va. Code 29-18-11 (Michie 2003).

[86] W. Va. Code 29-18-13 (Michie 2003).

[87] W. Va. Code 29-18-8 (Michie 2003).

[88] W. Va. Code 29-18-9 (Michie 2003).

[89] W. Va. Code 29-18-15 (Michie 2003).

[90] Joint Exercise of Powers Agreement, 1.

[91] Ibid., 6.

[92] Ibid., 6.

[93] Ibid., 9.

[94] Ibid., 6.

[95] Ibid., 9.

[96] Ibid., 6.

[97] Ibid., 10.

[98] 14038.3

[99] Cal. Code185030 (West 2003).

[100] Cal. Code 185032 (West 2003).

[101] Cal. Code 185034.1-9 (West 2003).

[102] Cal. Code 185036 (a-f) (West 2003).

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[105] Fla. Stat. Ann. 341.822.1 (West 2003).

[106] Fla. Stat. Ann. 341.835.1 (West 2003).

[107] Fla. Stat. Ann. 341.835.5 (West 2003).

[108] Fla. Stat. Ann. 341.822.2 (West 2003).

[109] Fla. Stat. Ann. 341.822.3 (West 2003).

[110] Fla. Stat. Ann. 341.821.4 (West 2003).

[111] Fla. Stat. Ann. 341.824.1-3 (West 2003).

[112] Fla. Stat. Ann. 341.829.1 (West 2003).

[113] Fla. Stat. Ann. 241.823.3 (West 2003).

[114] Fla. Stat. Ann. 341.836 (West 2003).

[115] Fla. Stat. Ann. 341.838 (West 2003).

[116] Fla. Stat. Ann. 341.830.1 (West 2003).

[117] Fla. Stat. Ann. 341.831.1 (West 2003).

[118] Ibid.

[119] Fla. Stat. Ann. 341.832-3 (West 2003).

[120] Fla. Stat. Ann. 341.836 (West 2003).

[121] Fla. Stat. Ann. 341.837 (West 2003).

[122] Fla. Stat. Ann. 341.840 (West 2003).

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[124] Alaska Stat. §42.40.010 (Michie 2003).

[125] Alaska Stat. §42.40.285 (Michie 2003).

[126] Alaska Stat. §42.40.250.1-29 (Michie 2003).

[127] Alaska Stat. §42.40.250.30 (Michie 2003).

[128] Alaska Stat. §42.40.100 (Michie 2003).

[129] Alaska Stat. §42.20.100 (Michie 2003).

[130] Alaska Stat. §42.20.100 (Michie 2003).

[131] Alaska Stat. §42.20.100 (Michie 2003).

[132] Alaska Stat. §42.40.120 (Michie 2003).

[133] Alaska Stat. §42.40.180 (Michie 2003).

[134] Alaska Stat. §42.40.120 (Michie 2003).

[135] Alaska Stat. §42.40.910 (Michie 2003).

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[137] www.bytrain.org.

[138] www.ncrr.com.

[139] Annual Report, 31.

[140] Annual Report, 31.

[141] NC Code. Ann. 136-190 (2003).

[142] NC Code. Ann. 124-12 (2003)

[143] Annual Report, 30.

[144] NC Code. Ann. 124-5.1 (2003).

[145] Va. Code Ann. 62.1-128, 132.3 (Michie 2003).

[146] Virginia Port Authority Annual Report 2002, 23.

[147] Virginia Port Authority Annual Report 2002, 23.

[148] Va. Code Ann. 62.1-129 (Michie 2003).

[149] Va. Code Ann. 62.1-129, 130 (Michie 2003).

[150] Va. Code Ann. 62.1-132.1.1-5 (Michie 2003).

[151] Va. Code Ann. 62.1-131 (Michie 2003).

[152] Va. Code Ann. 62.1-132.11 (Michie 2003).

[153] Va. Code Ann. 62.1-132 (Michie 2003).

[154] Va. Code Ann. 62.1-132.15 (Michie 2003).

[155] Va. Code Ann. 62.1-132.6 (Michie 2003).

[156] Va. Code Ann. 62.1-132.7 (Michie 2003).

[157] Va. Code Ann. 62.1-132.18 (Michie 2003).

[158] Va. Code Ann. 62.1-145 (Michie 2003).

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[164] Va. Code Ann. 62.1-140 (C) (Michie 2003).

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[166] Va. Code Ann. 62.1-140 (C) (Michie 2003).

[167] Va. Code Ann. 62.1-140 (C) (Michie 2003).

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[171] Va. Code Ann. 62.1-141 (Michie 2003).

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[191] Va. Code Ann. 62.1-208 (B) (Michie 2003).

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APPENDIX A

SENATE BILL 1279

CHAPTER 1041
An Act to amend the Code of Virginia by adding in Title 33.1 a chapter numbered 10.2, consisting of sections numbered 33.1-391.6 through 33.1-391.9, relating to the Rail Transportation Development Authority.
[S 1279]

Approved May 1, 2003

Be it enacted by the General Assembly of Virginia:
1. That the Code of Virginia is amended by adding in Title 33.1 a chapter numbered 10.2, consisting of sections numbered 33.1-391.6 through 33.1-391.9, as follows:

CHAPTER 10.2.

RAIL TRANSPORTATION DEVELOPMENT AUTHORITY.
§ 33.1-391.6. Short title.

This chapter shall be known and may be cited as the Rail Transportation Development Authority Act.

§ 33.1-391.7. Authority created; purpose.
There is hereby created the Rail Transportation Development Authority, hereinafter in this chapter known as the Authority. The purpose of the Authority shall be to finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment, or infrastructure, upon a determination by the Authority that such action is in the public interest.

§ 33.1-391.8. Composition of Authority; chairman and vice chairman; quorum.
The Authority shall consist of seven voting members appointed by the Governor. All members shall serve for terms of four years and may be reappointed for one additional term. For the initial appointments only, three of the appointments may be for terms of two years so as to allow for staggered terms. Such initial two-year terms shall not count against the term limitation. Vacancies shall be filled for the unexpired term.

The Authority shall elect from its membership a chairman and vice chairman, who shall continue to hold such office until their respective successors are elected. Four members of the authority shall constitute a quorum.

§ 33.1-391.9. Powers of Authority.
The Authority shall have the following powers together with all powers incidental thereto or necessary for the performance of those hereinafter stated:

1. To sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties;
2. To adopt and use a corporate seal and to alter the same at pleasure;
3. To enter into contracts and agreements;
4. To establish bylaws and make all rules and regulations, not inconsistent with the provisions of this chapter, deemed expedient for the management of the Authority's affairs;
5. To borrow money and to accept contributions, grants, and other financial assistance from the United States of America and agencies or instrumentalities thereof, the Commonwealth, or any political subdivision, agency, or public instrumentality of the Commonwealth;
6. To issue bonds in accordance with applicable law, including the issuance of bonds and other evidences of debt, in order to finance or assist in the financing of rail transportation projects undertaken under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or any other rail transportation project in the Commonwealth determined by the Authority to be in the public interest;
7. To make loans or grants for purposes that are consistent with this chapter and otherwise to receive and expend moneys on behalf of the Authority; and
8. To acquire land or any interest therein by purchase, lease, gift, or otherwise, and to hold, encumber, sell, or otherwise dispose of such land or interest, for purposes consistent with this chapter.

2. That the provisions of this act shall become effective only if reenacted by the 2004 Regular Session of the General Assembly.

APPENDIX B

SENATE JOINT RESOLUTION NO. 354

Requesting the Virginia Department of Rail and Public Transportation to study the Virginia Rail Transportation Development Authority to finance improvements to railroad freight and passenger transportation in Virginia. Report.

Agreed to by the Senate, February 20, 2003

Agreed to by the House of Delegates, February 19, 2003

WHEREAS, improvement and expansion of rail freight and passenger infrastructure and facilities in Virginia can reduce the need for expenditures on highway construction and maintenance by diverting both freight and passenger traffic from highway to rail; and

WHEREAS, the diversion of passenger and freight traffic from highway to rail reduces congestion, promotes safety, and avoids significant air and water pollution; and

WHEREAS, the freight railroads that currently own and operate most of the rail lines in Virginia do not have the financial resources to make many of the improvements to rail facilities and infrastructure that might clearly be in the public interest; and

WHEREAS, Senate Bill No. 1279, which creates the Virginia Rail Transportation Development Authority, is before the 2003 Session of the Virginia General Assembly; and

WHEREAS, the Virginia Rail Transportation Development Authority is required, pursuant to SB 1279 (2003), to "finance or assist in the financing of the construction, repair, renovation, restoration, acquisition, and extension of rail lines, equipment, and facilities in the Commonwealth, including rolling stock, shops, terminals, bridges, tunnels, and any other passenger rail or freight rail facilities, equipment, or infrastructure"; and

WHEREAS, to facilitate the clear public interest in improving rail facilities, there is a need to review and analyze the Virginia Rail Transportation Development Authority relative to its functions, structure, and responsibilities for both freight and passenger rail transportation; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Virginia Department of Rail and Public Transportation be requested to study the Virginia Rail Transportation Development Authority to finance improvements to railroad freight and passenger transportation in Virginia. In conducting its study, the Department shall

(i) analyze the feasibility of various options to finance improvements to railroad freight and passenger transportation in Virginia, including strategies that may be considered by the Virginia Rail Transportation Development Authority, pursuant to SB 1279 (2003);

(ii) conduct a literature search of national best practices relative to creating rail authorities and other relevant issues;

(iii) examine how the Virginia Rail Transportation Development Authority can finance and facilitate financing of the acquisition, construction, repair, improvement, and extension of rail facilities, including rolling stock and infrastructure that the Authority determines to be in the public interest; and

(iv) recommend the appropriate structure, powers and duties of the Authority, and revenue and sources of revenue needed to perform its responsibilities. All agencies of the Commonwealth shall provide assistance to the Department for this study, upon request. The Virginia Department of Rail and Public Transportation shall complete its meetings by November 30, 2003, and shall submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations for publication as a document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports no later than the first day of the 2004 Regular Session of the General Assembly and shall be posted on the General Assembly's website.

APPENDIX C

A SURVEY OF RAIL ENTITIES IN OTHER STATES AND IN VIRGINIA

Entities in Other States

Alaska Railroad Corporation

The Alaska Railroad Corporation is "a public corporation and is an instrumentality of the state within the Department of Community and Economic Development."[260] At the same time, however, it "has a legal existence independent of and separate from the state."[261]

The state retains ultimate authority over the corporation's activities in several key areas. Legislative approval is necessary to convey the corporation's entire interest in land, to issue bonds, to extend railroad lines, to lease land for more that 55 years (unless the corporation reserves the right to terminate the lease if the land is needed for railway purposes), or to apply for or accept a grant of federal land.[262]

Nevertheless, the corporation's powers are broad. Among other powers, it is enabled to "adopt a seal"; to "adopt bylaws"; to "sue and be sued"; to "appoint trustees . . . and prescribe their powers and duties"; to "hire legal counsel"; to "make contracts"; to acquire and dispose of interests in land for the benefit of the corporation; to "contract with and accept" funds from the United States or the state of Alaska and its subdivisions; to maintain, operate and manage the corporation's property; to maintain offices and facilities as it sees fit; to prescribe rates and determine routes and schedules; to enter into contracts with other carriers; to hire and discharge personnel; to assume all rights, liabilities, and obligations of the Alaska Railroad; to maintain a security force; to issue bonds; to borrow money; to undertake and provide for the construction, maintenance and operation of railroads and rail facilities; and enter into agreements with state agencies or other instrumentalities of the state.[263] Further, it is empowered to "do all things necessary or desirable to carry out the powers and duties of the corporation granted or necessarily implied in this chapter or other laws of the state or the laws or regulations of the federal government."[264]

Oversight of these functions rests with a seven-member board.[265] The board consists of the state commissioner of community and economic development, the state commissioner of transportation and public facilities, and five members who are appointed by the governor and approved by the legislature.[266] The five appointed members serve for staggered five-year terms.[267] Vacancies are filled by appointment by the governor and approval by "the members of the legislature in a joint session."[268] The chairman of the board "shall call meetings of the board at least once every three months" as well as additional meetings "as necessary."[269] Board members are "entitled to compensation at a rate of $400 for each day the member is engaged in the actual performance of duties as a member of the board" as well as per diem and travel expenses.[270] Four voting members constitutes a quorum and four affirmative votes are needed for any board action.[271]

The board is charged with the responsibility for managing and operating the railroad on a self-sustaining basis.[272] Despite its responsibility, however, the board may apply to the legislature for state appropriations "to be used to provide a particular service that is not otherwise self-sustaining if a subsidy is required to maintain that service."[273] It also has the authority, contingent on approval from the legislature, to issue bonds to raise needed capital.[274]

Consistent with its oversight responsibility, board approval is required for major decisions. Board approval is required for the corporation to issue bonds; to mortgage or pledge corporation assets; to donate property or assets of the corporation; to act as a surety or guarantor; to adopt a long-range capital improvement program; to adopt annual reports; to change rates or services levels; to expand rail lines; to select independent auditors and accountants; to enter into collective bargaining agreements; to adopt annual budgets; to adopt any capital project estimated to cost $500,000 or to last for more than one year; to exchange, donate or convey the corporation's entire interest in land subject to legislative approval; or to exercise the power of eminent domain.[275] In addition, it is the board's responsibility to establish all rules.[276]

Subject to board approval in these areas, however, responsibility for day-to-day operations rests with the chief executive officer of the corporation. The board is required to delegate to the chief executive officer "powers and duties necessary or appropriate for the management of the daily affairs and operations of the corporation."[277] In addition, it must also delegate to the chief executive officer or another designated officer the power to lease corporation property; to grant easements and permits for corporation-owned land; to convey other possessory interests so long as those conveyances do not transfer the corporation's entire possessory interest in the land; to establish rates and tariffs; to make routine changes in service levels; to establish procurement and accounting procedures; and to perform procurement activities.[278]

The corporation's real and personal property, assets, income and receipts are exempt from all state taxes. Further, its bonds and notes are also exempt from taxation (except for inheritance, transfer, and estate taxes).[279]

The corporation acts like a for-profit entity. It has three primary sources of revenue: freight traffic, passenger traffic, and real estate. Furthermore, the corporation seeks and receives significant funding to inaugurate new services and improve its track from the federal and state government. Federal funding has been the result of Alaska's congressional delegation,[280] in part to improve service to the Denali National Park, various Military Bases and to Anchorage International Airport[281] and as a payment to states without Amtrak service.[282]

Since 1985 when the company was divested from the federal government, the railroad has more than quadrupled in value and carries more than twice the passengers and nearly four times the amount of petroleum.[283]

It appears that Alaska uses the state-owned railroad to fill in the gaps in its transportation structure. The railroad operates barges from Seattle to move freight to and from Anchorage. It also contributes heavily to the tourism industry and serves passengers to and from Alaska's main gateway: the Anchorage International Airport.

California High-Speed Rail Authority

The California legislature created the California High-Speed Rail Authority to "direct the development and implementation of intercity high-speed rail service" that is fully integrated with the state's existing transportation infrastructure.[284] The authority is composed of nine members. The Governor chooses five members while the Senate Committee on Rules and the Speaker of the Assembly select two members each.[285] Members serve for staggered four-year terms and are picked to ensure that all regions of the state are equally represented.[286] Five members constitute a quorum.[287]

The authority is required to elect a chairperson and a vice-chairperson from among its members. The chairperson will preside at all meetings; the vice-chairperson will preside in the absence of the chairperson.[288] All members of the authority "shall receive compensation of one hundred dollars for each day that the member is attending to the business of the authority, but shall not receive more than five hundred dollars in any calendar month."[289] Members are also reimbursed for travel expenses.[290]

In addition, the members appoint an executive director who is "to administer the affairs of the authority as directed by the authority."[291] To carry out these tasks, the executive director, as authorized by the authority, may appoint necessary staff.[292]

The powers of the authority are two-tiered. Initially, it is empowered only to "prepare a plan for the construction and operation of a high-speed train network for the state. . . . The plan shall include an appropriate network of conventional intercity passenger rail service and shall be coordinated with existing and planned commuter and urban rail systems."[293] To fulfill this purpose, the authority may "conduct engineering and other studies related to the selection and acquisition of rights-of-way"; evaluate various high-speed rail systems and select one that is "appropriate"; "establish criteria for determining the award of a franchise"; "accept grants, fees, and allocations" from the state or its political subdivisions or from the federal government; "select a proposed franchisee, a proposed route, and proposed terminal sites"; "enter into contracts for preparation of the plan"; "prepare a detailed financial plan" and submit it to the legislature and to the Governor; and keep the public informed of its activities.[294]

Once either the legislature or the voters approve of a financial plan to fund the construction of the high-speed network, the enabling legislation provides that the authority will be empowered to engage in the construction and oversight of a high-speed rail network. To this end, it will become vested with the power to "enter into contracts with private or public entities for the design, construction and operation of high-speed trains"; "acquire rights of way through purpose or eminent domain"; "issue debt, secured by pledges of state funds, federal grants or project revenues"; "enter into cooperative or joint development agreements with local governments and private entities"; "set fares and schedules"; and "relocate highways and utilities."[295]

SB 1856 passed the Senate August 30, 2002. SB1856 would authorize a $9.95 billion general obligation bond for the November 2004 ballot. Nine billion dollars would be used to provide the state's share of the construction costs for the San Francisco to Los Angeles segment

of the high-speed train system as presented in the authority's business plan. The remaining $950 million would be dedicated to feeder rail programs to the high-speed rail system. Governor Davis signed the bill on September 19, 2002.[296]

The authority previously had adopted a plan calling for a statewide sales tax increase for the capital costs of building the rail lines for only as long as they are needed.

California's Alameda Corridor Transportation Authority

The Alameda Corridor Transportation Authority was created by a joint agreement between the cities of Long Beach and Los Angeles in order to create a Consolidated Transportation Corridor (CTC) to improve rail service from the ports of Long Beach and Los Angeles to the central Los Angles area.[297]

A 14-member governing board administers the authority, with each member serving a five-year term.[298] Terms, at first, shall be staggered to ensure a degree of continuity on the board.[299] Vacancies occurring "during a term and successors following expiration of the term of any member shall be filled in the same manner as the original appointments."[300]

It is the responsibility of the governing board to "provide for its regular, adjourned regular and special meetings; provided, however, it shall hold at least one regular meeting in each year. A majority of governing board members "shall constitute a quorum for the transaction of business, and a majority of the quorum present is required to take any action, except that less than a quorum may adjourn." The governing board "shall elect one member the Chairman . . . and one member the Vice-chairman" each July 1. It shall also select a secretary from its membership and, in accordance with applicable state law, a Treasurer and an Auditor. Members receive $50 per governing board meeting, to be paid from the authority's revenues.[301]

In addition, "[t]he Governing Board shall appoint an Executive Director from the staffs of either Port who shall be responsible for the administration of the Authority and a General Counsel from the City Attorney's Office of Long Beach and/or Los Angeles who shall provide legal advise to the Authority." Further, "[t]he Port of Long Beach or the Port of Los Angeles shall provide the staffs for and to the Executive Officer, Treasurer, Auditor, Controller, Secretary, and General Counsel positions until such as the Authority has sufficient financial resources through its own Revenues, at which time these positions may be filled by staffs of any agency represented on the Governing Board."[302]

With regard to expenditures, a three-member Finance Committee, subject to the approval of the governing board, "shall review and approve, by a majority vote, all matters involving the expenditure of funds provided by the Ports and/or funds from proceeds of bond issue(s) or other forms of indebtedness incurred or guaranteed directly or indirectly by the Ports." Funding from other sources "will not require review by the Finance Committee prior to consideration by the Governing Board."[303]

With regard to "matters pertaining to development . . . and implementation" of the CTC, a three-member railroad advisory board, which includes members of the railroad industry, is responsible for advising and making recommendations on all rail aspects of the plan. The railroad advisory board is also charged with preparing rail schedules and tariffs as well as resolving conflicts between various railroads.[304]

The authority is vested with "the power common to Long Beach and Los Angeles necessary for the development of the Plan of the CTC and the implementation of the CTC and related facilities" as well as:

> any other powers authorized by the Act, to wit: acquiring, constructing reconstructing, rehabilitating, maintaining in whole or in part, and leasing or selling, in whole or in part, land facilities and appurtenances necessary or convenient for the development and operation of a CTC, including acquisition of such land, facilities, or appurtenances by lease, contract, or purchase or disposal of land by lease of any property of the Authority; and to incur debts, liabilities or obligations…and to sue or be sued in its own name.[305]

It may also incur debts and issue revenue bonds or other debt instruments.[306] The authority may issue revenue bonds only with the prior approval of the Council of Los Angeles and the Council of Long Beach. It does not, however, need prior approval to refund bonds.[307] Los Angeles and Long Beach are not liable or obligated to repay the authority's debts.[308] Rather, "it is anticipated that such bonds will be payable from Revenues generated from the CTC and/or by pledges of revenues by other responsible agencies, such as the Board of Harbor Commissioners of Long Beach and Los Angeles."[309] The authority's powers to acquire and operate facilities are "subject only to such restrictions upon the manner of exercising such powers as are imposed upon the City of Los Angeles in the exercise of similar powers."[310] The authority must issue an annual report as well as an annual independent audit.[311] The DOT "may, if requested by the [authority], exercise the power of eminent domain to acquire . . . real property in Los Angeles County that is owned by a railroad corporation and that is necessary, incidental, or convenient for the construction of the Alameda Corridor project."[312]

Prior to construction, the authority is responsible for preparing and approving a general plan, which must "address and analyze all practical aspects of how the CTC should be designed and operated including alternative rail, highway routings and prioritization of the plan's elements."[313] During this time, the Joint Agreement provides that the Ports may have and use public funds, personnel and equipment in furtherance of the objectives and purposes of the agreement. The authority shall request services of the personnel of the Port of Long Beach and/or the Port of Los Angeles for services necessary to carry out the agreement. Those expenditures will be reimbursed by the authority once it issues bonds.[314] The authority may also employ professional and technical assistance provided that adequate funding sources are ensured beforehand. However, all contracts between Long Beach and/or Los Angeles with legal counsel, financial consultants, engineers, architects and other consultants working on the plan are binding on the authority and any fees incurred by either of the cities in this regard may be paid from the proceeds of the authority's bond issue.[315]

Upon approval of its plan, the authority may then implement its plan.[316]

Florida High-Speed Rail Authority

The Florida High-Speed Rail Authority is a "body politic and corporate" and "an agency of the state" with perpetual succession.[317] It was created pursuant to an amendment to the Florida Constitution mandating that the state provide a high-speed rail system connecting the five largest urban areas of the state.[318]

The governing board of the authority consists of nine members. In addition, the secretary of transportation serves as a nonvoting ex officio member of the board.[319] The governor, the president of the senate, and the speaker of the house of representatives each choose three members.[320] Of the governor's three appointees, one must have a background in "environmental concerns," one must have a "legislative background," and the third must have "a general business background." Of the president of the senate's three appointees, one must have a background in "civil engineering," one must have a background in "transportation construction," and the third must have a "general business background." Of the speaker of the house of representative's appointees, one must have a "legal background," one must have a background in "financial matters," and the third must have a "general business background." All serve for four-year terms and are not subject to confirmation by the senate.[321] Vacancies occurring during a term "shall be filled by the respective appointing authority in the same manner as the original appointment and only for the balance of the unexpired term."[322]

Members of the board "shall not be entitled to compensation but shall be entitled to receive their travel and other necessary expenses."[323] Each member's "firm or related entity may not have a financial or economic interest nor shall the authority contract with or conduct any business with a member or such member's firm or directly related business entity."[324] The board "shall elect one of its members as chair of the authority."[325] Five members constitute a quorum and any action taken by the authority must be approved by at least five votes.[326] The authority "may employ an executive director as it may require and shall determine the qualifications and fix the compensation."[327] It may "delegate to one or more of its agents or employees such of its power as it deems necessary to carry out" its purposes subject to continuing oversight and control of the Authority."[328] It is required to prepare and submit an annual report.[329]

The authority is vested with the power to "locate, plan, design, finance, construct, maintain, own, operate, administer, and manage the high-speed rail system in the state."[330] To this end, it may "purchase, lease, exchange, or otherwise acquire any land, property interests, or buildings or other improvements, including personal property within such buildings or on such lands, necessary to secure the rights-of-way for existing, proposed, or anticipated high-speed rail system facilities."[331] It may also dispose of any property pursuant to a resolution.[332] It may exercise all powers granted to corporations under the Florida Business Corporation Act with the exception that it may only incur debt as authorized by the legislature.[333] It may also seek and obtain federal matching funds with or without the assistance of the DOT.[334]

The DOT provides administrative support to the authority as requested by the chairperson of the authority but the "authority shall not be subject to control, supervision, or direction by the Department of Transportation in any manner."[335] Further, the authority may request technical, scientific or other assistance from the Florida Transportation Commission, the Department of

Community Affairs, and the Department of Environmental Protection.[336] It is also required to develop, in conjunction with the Executive Office of the Governor, the Department of Community Affairs, and the Department of Environmental Protection "a process to prevent, mitigate, and resolve, to the maximum extent feasible, any conflicts or potential conflicts" of the system.[337]

In addition, the authority "shall develop a marketing plan, a detailed planning-level ridership study, and an estimate of the annual operating and maintenance cost for the system and all other associate expenses."[338] It is vested with the power to acquire property and rights-of-way, to dispose of land, and to engage in associated development (i.e., of a rail station).[339] It is also authorized to set and change rates, fees and other charges – which shall be used to pay the authority's administrative, design, construction and maintenance costs and "shall not be subject to supervision or regulation" by any body other than the authority.[340]

The enabling legislation provides a set of criteria for the authority to apply in making its assessments of various options for the high-speed rail system it chooses to approve. It sets out minimum traveling speeds for an acceptable system, identifies the initial segments of the system to be developed, and mandates that the authority develop a program that utilizes nongovernmental resources "to the greatest extent possible."[341] It also mandates, however, that the authority itself create requirements for determining various other aspects of the operation: what information must be included in financial and business plans, preferred routes, station locations and "technology to be employed" and "[a]ny other issues the authority deems relevant to the development of a high speed rail system."[342] Moreover, while the legislature sets out the various cities to be connected, the authority is responsible for prioritizing the order in which the system will be constructed.[343]

The authority "may employ procurement methods" under Florida state law but it may also "adopt rules for and employ procurement methods available to the private sector."[344] It may also "prequalify interested persons or entities prior to seeking proposals" for the various aspects of the system.[345] To do so it "may establish qualifying criteria that may include, but not be limited to, experience, financial resources, organization and personnel, equipment, past record or history of the person or entity, ability to finance or issue bonds, and ability to post a construction or performance bond."[346] It is also authorized to develop and execute requests for qualifications and proposals.[347]

The authority may also engage in "development of associated developments to be a source of revenue for the establishment, construction, operation, or maintenance of the high-speed rail system."[348]

All expenses incurred in carrying out the provisions of the act are payable solely from funds provided in the act and from other legally available sources.[349] The authority is tax exempt.[350]

The act creating the authority "being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof."[351]

The authority anticipates that the rail will be paid for by private and federal funds to begin with because the legislature decided to minimize state funding.[352] Currently the authority is considering two proposals for the first leg of the project from Orlando to Tampa. In addition, the authority is actively lobbying for funds in the proposed federal reauthorization legislation: the Safe, Accountable, Flexible, and Efficient Transportation Equity Act (SAFETEA). However, the legislature has recently declined to appropriate additional money for construction. Proposed funding sources include a 1¢ gas tax and transfers from the Florida DOT's current budget.[353]

The Financial Statement shows revenues of $3.2 million and expenses of $0.8 million;[354] however, the authority reports that it received $5.8 million in 2002 from the Legislature for planning and engineering activities and $3.0 million from the federal government in matching funds in its 2003 report to the legislature.[355] It is difficult to determine what exactly the authority's expenses and revenues are because much of its activity is conducted within the Florida DOT.[356] However, for FY 2004, the authority is requesting $7.5 million for its operating budget.[357] The legislature responded with $7.2 million for continued development of the Tampa Orlando route and $5 million for intermodal studies. This does not include any monies needed to begin construction of the rail network by the constitutionally mandated date of November 1, 2003.

Maryland Transit Administration

The MTA is part of the Maryland DOT.[358] The MTA is headed by an administrator, who "shall be appointed by the Secretary of Transportation with approval of the Governor."[359] The Administrator "serves at the pleasure of the Secretary and shall report directly to him."[360] Further, the DOT and, in certain cases, the Maryland Transportation Authority, "may require that the exercise of any power or duty of the Administration be subject to prior approval of the Secretary or the Maryland Transportation Authority."[361] Subject to the authority of the secretary of transportation and, in certain cases, the Maryland Transportation Authority, the MTA has jurisdiction to plan, develop, construct, acquire, finance and operate transit facilities.[362] A "transit facility" "includes any one or more of combination of tracks, rights-of-way, bridges, tunnels, subways, rolling stock, stations, terminals, ports, parking areas, equipment, fixtures, buildings, structures, other real or personal property, and services incidental to or useful or designed for use in connection with the rendering of transit service by any means, including rail, bus, motor vehicle, or other mode of transportation, but does not include any railroad facility."[363]

To carry out its purposes, the MTA has the following general powers: "to sue and be sued"; to "adopt rules and regulations to carry out the provisions of this title"; to "construct, acquire, own, operate, maintain, and control any interest in any property"; to "sell, convey, or otherwise dispose" of property; to "apply for and receive grants . . . appropriations and loans"; to "contract with [the] State or any of its agencies or political subdivisions for providing transit facilities and transit services"; to "enter into and manage contracts with railroad companies to provide passenger or freight railroad services"; to "contract with any public utility, railroad company, transportation company, or private carrier for joint use of property"; to "contract for planning, engineering, and technical services" as well as to "contract for or employ consultants, engineers, attorneys, and other professional, planning, engineering and technical services"; to

make any contract "necessary for or incidental to the performance of its duties"; and to exercise all powers "reasonably necessary and declared objects and purposes of this title."[364]

It may also acquire any property located in the district by condemnation and "may purchase the capital stock of a private carrier or acquire by purchase, lease, or condemnation any property of a private carrier used or useful in rendering transit service."[365] Its purchases are not subject to state procurement laws.[366]

While the MTA may engage in the previous activities, it is required to "develop and coordinate policies and plans for the preservation, improvement, or provision of railroad facilities and railroad services" and to "conduct project planning and preliminary engineering related to railroad facilities."[367] The MTA is also required to "supervise construction of State-owned or financed railroad facilities and related capital improvements performed under contract with the Administration" and to "supervise the maintenance and rehabilitation of State-owned or financed railroad facilities and equipment."[368] All plans are to specify the "transit facilities to be constructed or acquired, including the location of terminals, stations, and parking facilities"; "the character, nature, design, and location of transit facilities"; "whether the transit facilities are to be constructed or acquired by lease, purchase, or condemnation"; "a timetable for providing the transit facilities"; "anticipated capital costs"; "estimated operating expenses and revenues"; "the type of equipment to be used"; "the areas to be served and the routes and schedules of service expected to be provided"; "the expected fares and charges for service"; "the plan of financing the capital costs and operation of transit facilities"; "when applicable, improvements in interjurisdictional commuter transit services including the location of corridors, routes, stations, and terminals"; and "any other information that the Administration considers relevant."[369]

To become operative, a transit plan must first be approved by the secretary of transportation, who may not grant approval to "the location of corridors, routes, stations, and terminals in any political subdivision unless the locations have been approved by the legislative body of the political subdivision."[370] Further, prior to "adoption, revision or amendment of any transit plan," all plans must first be circulated for comment to the governor, the chief executive officer or boards of each county in the district, the Public Service Commission, the Baltimore Regional Council of Governments, the Department of Planning, each private carrier operating in the district, each labor union representing workers engaged in transit operations in the district, the legislative bodies of all affected political subdivisions, and any other agency that the secretary determines.[371] The MTA is also required to prepare its plans "in consultation with the Baltimore Metropolitan Council" and is to "cooperate with the planning agencies of the Department of Planning and any other State or federal agency concerned with transit plans."[372] Further, to provide a framework for regional participation in the planning process, the MTA "may create technical committees concerned with planning and the collection and analyses of information to aid in the transportation planning process."[373]

The MTA, however, "may not construct, acquire or incur a commitment or obligation with any transit facilities specified in the transit plan until the necessary funds are available or provision has been made for the funds."[374] Subject to constitutional debt limitations, the State of Maryland and its political subdivisions may make grants to the MTA, guarantee its obligations,

and make contributions to meet the MTA's operating expenses.[375] The MTA, however, may not create an obligation on the state or any of its political subdivisions or levy any taxes.[376]

In addition to planning, the MTA is charged with the duty to "supervise construction of State-owned or financed railroad facilities and related capital improvements"; "supervise maintenance and rehabilitation of State-owned or financed railroad facilities and equipment"; and "monitor railroad passenger and freight services to assure maximum benefits to Maryland communities and businesses."[377] The MTA may provide transit service by operating the facilities themselves or contracting those operating responsibilities out, in whole or in part.[378] For those operations it conducts itself, the MTA is charged with cooperating with private carriers to the fullest extent practicable.[379]

The MTA may also "create and abolish employment positions" and "determine the qualification, appointment, removal, term and tenure of its employees."[380] In addition, it may determine the compensation of employees and managers, subject to approval in the budget.[381] It shall also "establish and maintain a police force."[382] It must "employ a general counsel who serves at the pleasure of the Administrator."[383] "The Administrator or any officer or employee of the Administration designated by him may conduct investigations, inquiries, and hearings as to any matter affecting railroad services and transit services in the District with which the Administration is concerned."[384] The administrator or his or her designee may "administer oaths; certify all official acts; and issue subpoenas and orders for the attendance and testimony of witnesses and the production of papers, books, and documents."[385] No officer or employee of the MTA may be "financially interested . . . in any contract, sale, purchase, lease, or transfer of property to which the Administration is a party."[386]

The MTA is required to recover 40 percent of its operating costs "from fares and other operating revenues" although it is also mandated to "establish a cost recovery goal of 50%."[387] In order to meet these goals, it is required to set "reasonable fares" and implement "cost containment measures as deemed necessary."[388] ("The Administration may exempt" from these requirements any "new mass transit service for a period of 36 months from the initiation of service as well as fare modifications for a period of 36 months from the date of modification.") [389] To the "extent practicable," those fares must be sufficient, when added to other revenues, to "maintain, repair, and operate the transit and rail facilities"; "provide for depreciation" of those facilities; "replace, enlarge, extend, reconstruct, renew, and improve" those facilities; "pay the costs of purchasing, leasing, or otherwise acquiring rolling stock and other equipment"; "pay the principal of and interest on any outstanding obligations of the Administration"; "pay the current expenses of the Administration"; and "provide for any purpose the Administration considers necessary and desirable to carry out" its responsibilities.[390] "Until a public hearing is held on the matter" the MTA may not "fix or revise any fare or rate charged to the general public; or establish or abandon any route."[391]

It must also "implement performance indicators" related to "operating expenses per vehicle mile," "operating expenses per vehicle trip" and "passenger trips per vehicle mile."[392] It must then report to committees in the state senate and house and the status of these indicators, "the status of managing-for-results goals of the Administration as they pertain to mass transit service in the Baltimore area," and how these indicators compare to "mass transit in the

Baltimore region and other similar systems nation-wide."[393] The MTA must also provide for an independent audit every four years, which "shall provide data on fares, cost containment measures, comparisons with other similar mass transit systems, and other information necessary in evaluating the operations of the Baltimore Regional Transit System."[394]

The MTA must comply with all local laws.[395] It is required to self-insure or acquire insurance.[396] As its activities are deemed to be "essential government functions," the MTA is exempt from state or local taxes with the exception of water and sewer charges.[397]

The MTA has total net assets of $1,646 million with operating revenues of $215 million and operating expenses of $189 million. Included in these expenses are $59 million in salaries and $86 million in payments to suppliers. The authority issued $381 million in debt for financing and had payments of $30 million to pay back interest and principal for the year ended 2002. The authority has had at least five bond issues that it uses to make capital improvements to facilities in Maryland. The authority spends approximately $3.5 million per annum for insurance premiums. The authority also receives fees from other government agencies for its services including the Maryland Port Administration. The MTA owns the Canton Railroad Corporation, which gives freight access to the Seagirt Marine Terminal. The railroad had operating revenue of $2.8 million and a net income of $0.315 million.

New York's Southern Tier Extension Railroad Authority

The New York legislature created the Southern Tier Extension Railroad Authority as a "body corporate and politic constituting a public benefit corporation."[398] Its stated intent in doing so was "to preserve and enhance the system of railroads serving Chautauqua, Cattaraugus, Allegany, and Steuben counties in New York state and Warren and Erie counties in the Commonwealth of Pennsylvania, so as to insure a healthy economy for these counties."[399] To this end, the stated purpose of the authority is to further develop and improve "railroad transportation" and other related services and to "develop and implement a unified railroad transportation policy and strategy" for the region.[400]

The authority consists of 14 members. The legislative bodies of the four New York counties each name three members based upon recommendations by their respective chief executives,[401] the Southern Tier West Regional Planning and Development Board appoints one member,[402] and the Seneca Nation of Indians appoints one, non-voting member.[403] The chair, vice-chair, secretary, "and other necessary officers" are appointed "by a majority vote of all the voting members to serve for such period as members shall decide."[404] The chair presides over meetings and names members to subcommittees "to assist the authority in carrying out its duties."[405]

All board members serve for staggered three-year terms but "shall continue to hold office until their successors are appointed and qualified."[406] "The resignation of any member shall be filed with the appointing authority and shall be effective when so filed. Vacancies occurring otherwise than by expiration of term of office shall be filled for the unexpired term in the same manner as provided for the original appointment."[407] Members of the authority receive no salary

or compensation but may be reimbursed for "authorized, actual and necessary travel and expenditures."[408] Members may be removed by a resolution from the entity that named them.[409] A majority of "voting numbers of the authority then in office shall constitute a quorum."[410]

The act provides the authority "shall continue for thirty years from the effective date of this title, or so long as it shall have bonds or other obligations outstanding or until its existence shall otherwise be terminated by law."[411] Upon its termination, "all its rights and properties shall pass to and be vested in the participating counties."[412]

The authority "shall adopt by-laws governing its operation and keep a record of its resolutions, transactions, findings and determinations, which record shall be a public record."[413] It is also vested with the power to "sue and be sued"; "have a seal and alter the same at pleasure"; "borrow money"; "make and alter by-laws"; "enter into contracts and leases"; "acquire, hold and dispose of real or personal property"; "rent, lease or grant easements to other parties"; appoint officers, employees, lawyers, auditors, engineers and other consultants and "to fix and determine their qualifications, duties, and compensation"; "make plans, surveys and studies" it feels necessary; to apply for and accept loans, gifts, and grants from the federal or state government or from any other source, public or private; "designate the depositories of its money"; "establish its fiscal year"; and, in general, "to do all things necessary or convenient or desirable to carry out its purposes and exercise the powers expressly given" to it.[414]

In addition, the authority may, upon the approval by the majority of the voting members of the authority, "acquire, by purchase, gift, grant, transfer, contract or lease, any railroad facility, wholly or partially within the counties of Chautauqua, Cattaraugus, Allegany and Steuben."[415] It may also accept and receive the possessory interest of the state or any of its political subdivisions in any other piece of property as well.[416] Further, the authority may "establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair" a railroad facility or related facilities itself or provide for such as it sees fit, including through an agreement with a private for-profit firm.[417] It may also "acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities."[418] In addition, it may establish and join with others to establish and collect "fares, tolls, rentals, rates, charges and other fees" as well as schedules and standards of operation.[419] It may also "in its own name…apply for and receive and accept grants of property, money and services and other assistance offered or made available to it by any person, government or agency" and use such grants to meet capital or operating expenses or for any other reason it deems necessary.[420] Finally, the authority "may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of railroad facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority."[421]

The activities and operations of the authority are not subject to local laws[422] or to taxation from any state or local taxes.[423]

In order to avoid duplications of effort, the authority is authorized to use existing studies, plans and information of any state agency or municipality.[424] State agencies and municipalities

may also consent to use by the authority of any real or personal property owned by them respectively.[425]

The authority operates in two states and involves four county governments and one Indian nation. Norfolk Southern sold the railroad to the authority, which leases it back to Norfolk Southern who leased it to a short line for 30 years. Part of this lease revenue pays some of the overhead expenses of the authority. The authority contracts out its management to the regional planning board. The authority does not pay real-estate taxes, which makes the line viable for Norfolk Southern. The authority uses public funds to make improvements. One key to their success is a strong relationship with an engineering firm that evaluates and prioritizes projects and bidders. Another key is their ability to rely on the expertise of the New York DOT. Since last August, the Southern Tier has let three contracts, installed 45,000 rail ties, made several bridge and washout repairs and installed continuously welded rail.

North Carolina Railroad Company

The NCRRC is a Real Estate Investment Trust whose voting stock is owned completely by the State of North Carolina.[426] Chartered by the legislature in 1854 in order to spur economic activity in the state, the company constructed 223 miles of track from Goldsboro to Charlotte.[427] In 1989 the company combined with another state-owned rail corporation to extend its overall line to approximately 317 miles of track, which runs from Charlotte to the Morehead City Port Terminal on the Atlantic Coast.[428]

The NCRRC owns and manages the entire line along with several other properties and leases exclusive freight trackage rights to Norfolk Southern, which is also responsible for its maintenance of the line for freight purposes.[429] In addition, Amtrak provides passenger service over the company's lines pursuant to an agreement with Norfolk Southern.[430]

The *Code of North Carolina* provides that the NCRRC, as a railroad corporation, has the following powers: "To survey and enter on land"; "to condemn land under eminent domain"; "to take property by grant"; "to purchase and hold property"; "to grade and construct road"; "to intersect with highways and waterways"; "to intersect with other railroads"; "to transport persons and property"; "to erect stations and other buildings"; "to borrow money, issue bonds, and execute mortgages"; "to lease rails"; and "to establish hotels and eating houses." [431]

Further, as a state-owned railroad company, the NCRRC possesses "in addition to the powers of any railroad corporation" the power to "[l]ease, license, or improve" its property and the power of eminent domain.[432]

As a Real Estate Investment Trust, the company must distribute 90 percent of its profits to maintain its tax-exempt status.[433] The state, as the sole owner of the NCRRC, receives all of those funds. However, as the *Code of North Carolina* currently provides, 100 percent of the annual dividends received by the state must be used "by the Department of Transportation for the improvement of the property of the [company] as recommended and approved by the Board of Directors" of the company.[434]

In addition, the North Carolina DOT is authorized to receive and administer federal funds for rail preservation and can provide matching funds to federal contributions for rail revitalization from "private resources, county funds or state appropriations as provided by the General Assembly."[435]

The North Carolina railroad entered into a 50-year lease agreement with Norfolk Southern for the use of its track. Norfolk Southern then allows Amtrak to use the track. The lease between the Railroad and Norfolk Southern generated $11.4 million of net income for 2002. Other lease and interest income amounted to $1.6 million. General administrative expenses included salaries, professional fees, insurance and depreciation amounted to $1.8 million. The NCRRC is tax exempt as a Real Estate Investment Trust. Most of this income is reinvested in conjunction with the North Carolina DOT and Norfolk Southern in track upgrades and two new higher capacity bridges.[436]

Ohio Rail Development Commission

The ORDC is "an independent agency of the state within the department of transportation."[437] The commission "shall . . . develop, promote, and support safe, adequate, and efficient rail service throughout the state," "[m]aintain adequate programs of investigation, research, promotion, planning, and development for rail service," and "[p]rovide for the participation of private corporations or organizations and the public in the development, construction, operation, and maintenance of rail service, and as franchisees thereof."[438]

The commission has the power to adopt, alter and repeal bylaws; "adopt an official seal"; "maintain a principal office" and, if necessary, regional offices; "sue and be sued in its own name and plead and be impleaded in its own name"; "undertake . . . the acquisition, renovation, repair, refunding, operation, maintenance, or construction of any rail service project"; "establish and operate a revolving loan fund"; "issue bonds and notes and refunding obligations of the state"; "acquire by gift or purchase, hold, or dispose of real and personal property"; "make and enter into all contracts and agreements"; receive and accept grants from federal agencies; purchase insurance; "establish or increase reserves from moneys received"; "receive and disburse the proceeds" of bonds; make grants and provide consultation services to political subdivisions, transportation authorities, and other persons; "establish and amend the criteria and qualifications for the making of any loan"; and "do all acts necessary and proper to carry out the powers expressly granted to the commission."[439]

The board consists of 12 voting members. Six members are appointed by the governor with the advice and consent of the senate.[440] "Of the members appointed by the governor, one shall serve as chairman of the commission, one shall represent the interests of a freight rail company, one shall represent the interests of passenger rail service, one shall have expertise in infrastructure financing, one shall represent the interests of organized labor, and one shall represent the general public."[441] In addition, "[n]o more than four members of the six appointed to the commission by the governor shall be from the same political party."[442] In addition, the majority and minority leaders of the state house and senate each appoint one member.[443] Finally, the president of the senate and the speaker of the house of representatives each appoint one

member to represent the general public.[444] The director of transportation and the director of development are ex officio members of the commission.[445] Six members constitute a quorum and the affirmative vote of at least five members is necessary to authorize any action by the commission.[446] Members serve for six-year terms and all "are eligible for reappointment."[447] All members are reimbursed for "actual expenses incurred in the performance of their duties."[448] All must be from Ohio.[449]

The commission may employ and determine the compensation for "an executive director, who shall have the appropriate experience as determined by the commission, and a secretary-treasurer and other employees that the commission considers appropriate."[450]

The DOT "may use all appropriate sources of revenue to assist the commission in developing and implementing rail service" but "all public funds acquired by the commission shall be used for developing, implementing, and regulating rail service and not for operating rail service unless the general assembly specifically approves" the expenditure of such funds.[451]

Either the commission or the DOT, acting on the behalf of the commission, "may apply for and receive from the United States government loans and grants in accordance with any federal law or program concerning rail transportation."[452] The commission may itself "issue grants and loans to any transportation authority or to any person for the purpose of continuing or instituting rail transportation in the state."[453]

The commission "shall prepare a plan for the construction and operation of an intercity conventional or high speed passenger transportation system" to be constructed and operated by the commission.[454]

The commission "may purchase or lease any portion of rail property of a railroad corporation, and may purchase or lease any other property, facilities, or equipment considered necessary by the commission for the operation of rail services, and the maintenance of track and other rail property."[455] The commission may also "restore, repair, relocate, or upgrade any rail property purchased, leased, or maintained by the commission" as well as "property owned by another person as long as such action is necessary for the efficient operation of rail services provided by the commission."[456] It may "obtain modernization loans from the federal government" to do this.[457]

Further, the commission "may operate any rail property acquired by it over track owned or leased by the commission, or over track owned by another person pursuant to an agreement with that person as long as such action is necessary for the efficient operation of rail service provided by the commission."[458]

It "may sell, or lease any of the rail property that it possesses to any person for the continuation and operation of any rail service that is provided for pursuant to this chapter."[459]

The rail development fund consists of proceeds from the sale, lease, or transfer of any rail property owned by the commission and other money as provided by law. It "shall be used for the purpose of acquiring, rehabilitating, or developing rail property or service, or for the

participation in the acquisition of rail property."[460] It "shall also be used to promote, plan, design, construct, operate, and maintain passenger and freight rail transportation systems, and may be used to pay the administrative costs" of the commission.[461] It may not be used to provide loan guarantees.[462]

There also exists a federal rail fund, which also consists of proceeds from the sale, lease, or transfer of rail property owned by the commission as well as other money as provided by law. It "shall be used to acquire, rehabilitate, or develop rail property or service; to participate in the acquisition of rail property with the federal government, municipal corporations, townships, counties or other governmental agencies; and to promote, plan, design, construct, operate, and maintain passenger and freight rail transportation systems."[463] It too may be used to pay administrative costs but cannot be used to provide loan guarantees.[464] To acquire rail property, the commission "may obtain acquisition loans from the federal government or from any other source."[465]

The commission "may purchase any portion of the rail property of a railroad corporation and may purchase any other property, facilities, or equipment considered necessary by the commission for the operation of rail service" so long as the commission determines that the property is "suitable for the efficient operation of rail services" and the board approves.[466]

The commission "may issue bonds, payable solely from revenues, to pay the cost of or finance, in whole or in part, rail service projects" of the commission or loans to other authorities, towns, or counties.[467] When issuing bonds, the commission is authorized to determine the "number, location, and other characteristics of projects, including…assurance that the projects to be financed by bonds will create or preserve jobs and employment opportunities or improve the economic welfare of the state."[468] It is also authorized to determine eligibility requirements "for projects for which loans are made."[469] In determining such eligibility, the commission must take into account "the length of time any borrower has been engaged in rail service"; "the net income or net worth of any borrower"; "the availability or feasibility of alternative financing"; the type or amount of collateral to be pledged; and the "amounts and types of insurance coverage required"; and any other related matters.[470] The commission may also, if it chooses, "secure bonds by a trust agreement or indenture of mortgage between the issuer and a corporate trustee."[471] All bonds are deemed to be lawful investments.[472] The commission may issue refunding bonds.[473]

The real and personal property of the commission "shall be subject to ad valorem, sales, use, and franchise taxes."[474] Bonds, however, "are free from taxation within the state."[475]

The general assembly has deemed public private cooperation to be desirable and, therefore, the commission may encourage private participation.[476] To that end, the commission may adopt and amend rules "governing the process whereby a private corporation or organization may apply to the commission for a franchise for all or part of a rail system."[477] The legislature, moreover, sets out criteria that the commission "may" use for determining the qualifications of applicants as well as duties owed by the franchisee and oversight responsibilities for the commission.[478] The commission may issue bonds on behalf of the franchisee.[479]

The ORDC used to receive much of its funding from the Corporate Franchise Tax but with the split of Conrail and the uncertainty associated with that, the Governor elected to fund Ohio's activities from the General Revenue Fund and place all taxes collected from the Corporate Franchise Tax on Railroads into this fund. The ORDC received $6.3 million in FY 00 and $6.28 million in FY 01 with a further $1 million each year from the Federal Special Revenue Fund for Rail Transportation. These funds are from Local Rail Freight Assistance (National Rail Service Continuation Grants). These funds can be used to acquire rail line or rail properties for freight.

The ORDC also maintains a Panhandle Lease Payments Fund (about $0.77 million per year) from which to pay monthly lease payments to Caprail I, Inc., for the lease of the Panhandle Rail Line.

Pennsylvania Department of Transportation

The Pennsylvania General Assembly passed the Rail Freight Preservation and Improvement Act in response to its concern that the "satisfactory movement of goods within the Commonwealth and the economic health of Commonwealth industries [were] being jeopardized by the deterioration or inadequate provision of rail freight transportation services with the Commonwealth."[480] It consists of two distinct yet related components meant to address these concerns.

First, the act directs the DOT to undertake "either through its own staff or through use of a consultant or consultants, or both, a comprehensive freight rail study of rail freight transportation services, systems and facilities within the commonwealth and recommendations for their preservation and improvement."[481] The report is to include identifying "the rail network required to support Pennsylvania's industries"; identifying "strategies to be used by the Commonwealth in assisting in the preservation of rail lines"; identifying "major heavy, high and wide freight flows" and how "the department could act to preserve clearances" on these routes "in the event of track alteration or removal"; identifying "strategies in the event the Conrail system is broken up or if Conrail is sold to another railroad which only maintains main line services"; analyzing the "disposition of Commonwealth owned branch lines as well as remaining route miles that have not been acted upon by Conrail"; and identifying "all other modes involved in rail freight movements and assess intermodal needs, including motor freight transfer facilities, port access and air freight movement."[482] The DOT is instructed to "consider the conclusions of the [study] in the implementation of its programs designed to preserve and improve the rail freight transportation services, systems and facilities within the Commonwealth, including the development of new initiatives."[483] The act further instructs the General Assembly to provide funds annually so that the DOT can carry out the study.[484]

To aid in this process, the legislature also created the Rail Freight Advisory Committee to "advise and comment on the comprehensive rail freight study, to advise and comment on all phases of the rail freight transportation program activities being undertaken or financially assisted by the department, and to propose methods, strategies or technologies for improving rail freight transportation services systems or facilities within the Commonwealth."[485] The

Committee consists of 24 members who serve for staggered three-year terms. The membership consists of the secretary of transportation (ex officio); the secretary of commerce (ex officio); the chairman of the Pennsylvania Public Utility Commission (ex officio); the chairman and minority chairman of the Senate Transportation Committee; the chairman and minority chairman of the Transportation Committee of the House of Representatives; and 17 members of the public "representing the areas of concern specified who shall have extensive experience and knowledge of rail freight transportation activities throughout the Commonwealth to be appointed by the Governor."[486] These members representing the public include two representatives of Class I railroad companies; three representatives of regional railroad/short line operation; six representative rail shippers" representing the areas of coal, steel, lumber, intermodal, chemical and food products/agriculture, respectively; one representative from the Pennsylvania Chamber of Commerce; two representatives of regional/local planning commissions; and one representative of rail contractors/suppliers."[487] Each "may designate a representative to serve in his or her stead."[488] The Committee "shall meet at least four times every 12 months, but may hold additional meetings as are called by the Chairman or by petition of at least seven committee members."[489] All members are entitled to per diem expenses "to be set by the committee but not to exceed $75.[490] It receives staff support "to properly carry out its functions" from the DOT.[491]

The second component of the program is to provide funding for essential improvements as determined by the comprehensive rail plan. The authority is authorized to "[p]rovide operating subsidy grants to rail companies, transportation organizations or municipalities to defray, or assist in defraying, the net deficit incurred by such entities in providing essential rail freight transportation" and performing "accelerated maintenance projects" within the Commonwealth.[492] It is also authorized to "[u]ndertake capital projects and to provide capital project grants to railroad companies, transportation organizations or municipalities" and to "[a]cquire by purchase, lease, eminent domain proceedings, gift or otherwise, all and any property, in such estate as determined by the secretary, for promoting the purposes of this act."[493] The DOT may also undertake "research, studies, analysis and planning, to make grants to railroad companies, transportation organizations and municipalities for research, studies analysis and planning"; "demonstration projects" and "grants to railroad companies, transportation organizations and municipalities for demonstration projects"; "marketing activities and to make grants to railroad companies, transportation organizations and municipalities for marketing activities designed to foster" efficient use of rail services and facilities; and "audits of any project being financially assisted by the department."[494]

The legislation also includes guidelines governing grants made by the authority. All grants will be made only if there exists "a responsible level of local financial participation, to be determined by the department."[495] In addition, grants "shall be made only upon application filed by a grantee reviewed and approved by the department."[496] Grants "may be made with reference to any appropriate project regardless of when it was first commenced or considered and regardless of whether the costs…have been incurred prior to the time the project is undertaken or the project grant is applied for or made" (696.6.b.3).[497] Finally, the DOT is "authorized to make loans of federal funds to railroad companies, transportation organizations or municipalities . . . for the rehabilitation and improvement of rail freight transportation systems and facilities."[498]

The legislation also enables the DOT to "enter into contracts and to make joint contracts of purchase with any railroad company, transportation organization or municipality." It may do so "without advertisement for competitive bids, where such work is to be done at costs by the personnel and with the facilities of the railroad company, local transportation organization or municipality on whose system the property is to be used."[499] The DOT may also:

> sell, transfer, lease or grant any license to, easement over or any other interest in all, or any part of, the rail properties and other properties acquired under the provisions of this or any other rail-related act to any responsible person, firm, corporation, municipality or instrumentality thereof, municipal authority, transportation authority, the Federal Government or any branch or agency thereof, for continued operation or other use compatible with the operation of a railroad or any public purpose, when approval for the continued operation or other public purpose is granted by the Interstate Commerce Commission of the United States, when such approval is required. The department may exercise the authority and power granted pursuant to this paragraph without the necessity of competitive bidding.[500]

If the property conveyed by the DOT is used "for any purpose other than that which is compatible with the operation of a railroad or any public purpose, the property or property right shall revert to the Commonwealth."[501] The DOT must inform the chairs of the Transportation Committees of the Senate and House of Representatives at least 30 days prior to the sale of any property.[502]

The enabling legislation also sets out the requirements and procedures for competitive bidding.[503]

South Dakota Railroad Authority

The South Dakota legislature created the South Dakota Railroad Authority in response to what it deemed "a serious emergency as a result of the imminent abandonment by railroads of substantial services . . . and the deteriorated condition of their properties and facilities."[504] They found that this situation threatened the state's economic welfare and placed additional burdens on the state's highways but that the improvement of rail lines and rail service could not be achieved without public investment.[505] The authority was the vehicle by which the state intended to provide such investment.

The authority has seven members, who are appointed by the governor with the advice and consent of the senate.[506] Each member serves for a four-year term.[507]

It is vested with the following general powers: to employ agents and employees; to have and alter a common seal; to plan, establish, acquire, develop, construct, purchase, enlarge, maintain, equip, and protect railroads and railroad facilities; to conduct continuous studies of the need for such facilities; and to enter into contracts.[508] It may also acquire property through purchase, condemnation, eminent domain, or grant.[509]

To finance its projects, the authority may borrow money and issue bonds. Repayment of bonds may come only from income and revenues derived from the facilities financed by those bonds.[510] The state is in no way obligated to repay the bonds.[511]

Despite these powers, however, the authority is not an autonomous body. Rather, it must receive prior approval for all expenditures from the South Dakota State Railroad Board and the governor.[512] In addition, the DOT "shall prepare or review and approve plans and specifications for and have supervision over any project to be undertaken by the authority."[513]

Maintenance of all state-owned railroad property is the duty of the DOT.[514] Once all debts on a piece of property owned by the authority have been repaid, the authority "shall convey" that property to the DOT at no charge.[515]

All property owned by the authority is tax exempt.[516]

West Virginia State Rail Authority

The West Virginia legislature created the West Virginia State Rail Authority (SRA) under Chapter 29, Article 18 of the *Code of West Virginia* (also known as the West Virginia Railroad Maintenance Act) in 1975 in order to "participate in the rehabilitation, improvement and restoration of the financial stability of the railway system in the State of West Virginia and enable it to remain viable in the public sector as a mode of transportation."[517]

The purpose of the SRA is to carry out rail projects or to subcontract out those projects to any person or government agency so long as those projects are consistent with "any applicable comprehensive plan for railroad projects approved by the authority."[518]

The SRA may exercise "all powers necessary or appropriate to carry out and effectuate its corporate purpose."[519] Among other powers, the authority "may" "adopt . . . amend and repeal by-laws"; "adopt an official seal"; maintain offices; "sue and be sued"; "make loans and grants to governmental agencies and persons carrying out railroad projects"; issue bonds to pay for railway maintenance; acquire, hold, and dispose of real and personal property, including rail properties; exercise the power of eminent domain; "make and enter into contracts"; "appoint a director and employ managers, superintendents and other employees, and retain or contract with consulting engineers, financial consultants, accountants, attorneys and other consultants and independent contractors as are necessary in its judgment"; receive grants for state and federal agencies; engage in research and development; purchase insurance; set, alter and collect rates and other charges; establish, administer and coordinate a state plan for rail transportation; and to "do all things otherwise necessary to maximize federal assistance to the state under Title IV of the federal Regional Reorganization Act of 1973."[520] In addition, the authority "may sell, transfer or lease all, or any part, of the rail properties and other property acquired . . . to any responsible person, firm, or corporation for continued operation of a railroad or other public purpose."[521]

The SRA is also empowered to issue bonds in amounts it deems necessary in order to pay for rail projects.[522] It may, at its discretion, secure the proceeds of these bond issues by trust agreement.[523] Those bonds are debt of the state or any of its political subdivisions and are repayable solely from the revenues and funds pledged for their payment.[524] The SRA "shall deposit proceeds derived from" its actions into a "railroad maintenance authority fund" and "shall . . . use moneys in such fund to effectuate the provisions and purposes" of the enabling

legislation.[525] Such funds can be used to study "any proposed railroad project."[526] The SRA may also invest any funds that it does not currently need; income from those investments will be credited to the fund.[527] "The Authority is an enterprise fund and a component unit of the West Virginia DOT and the State of West Virginia."[528]

The SRA is currently operating its railroads at a loss. One customer accounts for more than 90 percent of its revenue.[529] For 2002, the SRA had operating revenues of $1.7 million but operating expenses of $3.3 million. It relied on $3.9 million of transfers to make up that deficit. The SRA received $2.6 million from the general fund appropriations from the legislature and an additional $1.0 million in special funds. The SRA used these monies for capital improvement projects and maintaining MARC lines in the Eastern Panhandle. The SRA received $0.3 million in federal grants.[530]

The SRA also raised money through commercial development revenue bonds that it issued in 1993.[531]

Entities in Virginia

Virginia Port Authority

The VPA is a political subdivision of the Commonwealth whose duty is "to foster and stimulate the commerce of ports of the Commonwealth."[532] Its major activities include "developing water transportation facilities; providing security services; maintaining ports, facilities, and services; providing public relations and domestic and international advertising; and with offices in the United States and several Foreign Countries, developing Virginia's ports through cargo solicitation and promotion throughout the world."[533] To further these goals, the VPA established Virginia International Terminals, Inc. (VIT), in 1982 to operate the terminals.[534]

In carrying out this endeavor, "[a]ll of the powers, duties and rights" of the VPA conferred by the state are to "be exercised by the Board of Commissioners of the Port Authority."[535] The board, however, is required to appoint an executive director who, subject to the board's approval, "shall employ or retain such other agents or employees subordinate . . . as may be necessary."[536] The board is also authorized to fix the compensation of the executive director "at a level which will enable the Authority to attract and retain a capable Executive Director."[537] The board may delegate its powers to the executive director as it sees fit.[538]

The VPA is vested with the following general powers: to sue and to be sued, to make contracts, "to adopt and use a common seal and alter such at its pleasure," to procure insurance, and to develop policies and procedures for the procurement of goods, services and construction based on competitive principles."[539] In addition, the VPA is empowered to "have and maintain" a principal office as well as branch offices if necessary.[540] The enabling legislation also grants the VPA general police powers[541] as well as the power of eminent domain,[542] and the power to set rate structures, to employ personnel and legal counsel, to make and enforce reasonable rules and regulations regarding its ports, to cooperate with federal agencies, and to apply for and accept grants or loans of money or property.[543] It also charges the VPA with responsibility for planning

for the development of the ports and mandates that the authority communicate those findings to the General Assembly.[544] In any conflict between the VPA and any one of the towns in which the VPA's ports are located, "the exercise of the authority granted to the Board of Commissioners . . . shall be resolved in favor of the exercise of such authority by the Board of Commissioners."[545] It must also "submit an annual report to the Governor and General Assembly on or before November 1 of each year" and maintain "accounts and records . . . showing receipt and disbursement of funds . . . in such form as the Auditor of Special Accounts prescribes."[546]

The VPA is exempt from the Public Procurement Act and the Virginia Personnel Act.[547] Instead, it is empowered to appoint, employ, dismiss, fix and pay compensation to employees, officers, agents, advisers, and consultants, including financial and technical advisers, engineers and public accountants" and to "determine the duties and compensation" of those employees "without the approval of any other agency or instrumentality."[548]

The VPA is empowered to issue revenue bonds in order to "acquire, construct, maintain, equip, and operate marine terminals, port facilities, wharves, docks, ships, piers, quays, elevators, compressors, refrigeration storage plants, warehouses, and other structures necessary for the convenient use of the same in the aid of commerce."[549] Those bonds are exempt from state and local taxes.[550] They are not, however, backed by the full faith and credit of the Commonwealth or any political subdivision.[551] Thus, if the VPA cannot repay its bonds on its own, the Commonwealth is not legally bound to repay them. Further, while the VPA may issue bonds to acquire property and equipment, it is prohibited from expending funds or contracting a debt that will benefit privately owned property unless use of the improved property "is guaranteed to the Authority or the Commonwealth by a lease extending beyond the useful life of the improvement, repair, maintenance, addition or new facility, or such expenditure or indebtedness is approved in writing by the Governor."[552] The VPA is also empowered to "rent, lease, acquire, construct, and dispose of harbors, seaports, port facilities, and such property, whether real or personal, as it may find necessary or convenient and issue revenue bonds therefore without pledging the faith and credit of the Commonwealth."[553] It may not, however, have at any time more than $200 million in total principle outstanding, an amount that includes refunding bonds but excludes revenue bonds.[554]

The VPA may issue refunding bonds as it "may deem necessary, but not exceeding an amount sufficient to provide for the payment of the principal of the bonds so to be refunded, together with all unpaid interest accrued and to accrue and with any redemption premium thereon and all costs and expenses incident to the authorization and issuance of such bonds as determined by the Authority."[555] The bonds "shall be dated, shall bear interest at the prevailing rate of interest at the time, shall mature at such time or times not exceeding forty years from their date or dates, as may be determined by the Authority."[556] The VPA may make the bonds "redeemable before maturity . . . at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of bonds."[557] "The Authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest."[558] All bonds are to be signed by the executive director or "shall bear his facsimile signature" as well the official seal of the VPA or a facsimile.[559] All bonds are "declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the

Commonwealth."[560] The bonds "may be issued in coupon or in registered form, or both" and the VPA "may sell such bonds in such manner, either at public or private sale, and for such price, as it may determine will best effect the purposes of this chapter."[561]

"The proceeds of the bonds of each issue shall be used solely for the payment of the cost of acquisition, construction, reconstruction and control of port facilities . . . or, in the case of refunding bonds, to refund such bonds including any unpaid interest accrued and to accrue and any redemption premium thereon and all cost and expenses incident to the issuance of such bonds."[562] The VPA may not issue any other bonds without prior approval of the majorities of both houses of the General Assembly. "Refunding bonds may only be issued with the consent of the Governor." The governor, however, "may approve bonds which have not been authorized by the General Assembly if such bonds are to finance capital projects that emerge between legislative sessions, provided the debt is required to stimulate commerce . . . and provided that certain other criteria are met. These criteria are that the total amount of those bonds added to the total amount of VPA bonds currently authorized does not exceed the limits set in 62.1-140B; that the issuance will not have an adverse effect on other projects or programs; that the governor believes the action "may result in a measurable benefit to the Commonwealth"; the authorization includes a detailed description of the project; the requirements of state environmental laws are met; and the chairs of the house appropriations and senate finance committees are informed. [563]

The VPA, at its discretion, may secure its bonds "by a trust agreement by and between the Authority and a corporate trustee."[564] The VPA is authorized to create a sinking fund to be used to repay its bonds.[565] Proceeds of bond issues "shall be deemed to be trust funds to be held and applied solely as provided" by the law.[566] Bondholders have the power to sue the VPA at law or in equity "except to the extent the rights herein given may be restricted by . . . trust agreement."[567] Bonds issued by the VPA are legal investments "in which all public officers and public bodies of the Commonwealth and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds."[568] All of the VPA power "shall be liberally construed" to effect its purposes.[569]

However, Commonwealth Port Fund Revenue Bonds may reflect the general obligation pledge of the Commonwealth of Virginia.[570]

The VPA is a public agency with approximately 50 percent of its funding generated by terminal operations.[571] "The public funds we receive are used in connection with capital projects. Our operating revenues are generated by the business we run and pay the expenses required to make that business as success."[572]

The VPA has two primary sources of non-bonded revenue: the TTF and VIT. [573] The transportation trust fund is funded primarily by motor vehicle taxes and sales taxes. The VPA receives 4.2 percent of the trust fund. For FY 03, the TTF provided revenue of $30.9 million, which should increase to $31.2 million in FY 04.[574] For the year ended June 30, 2001, the VIT transferred to the VPA $26 million, for the year ended June 30, 2002, that payment was about $20 million. For FY 03, VIT revenue is projected to be $147 million, and for FY 04 it is projected to be $160 million. Net income for VIT for the year ending June 30, 2004, will be

$37.5 million, an increase from $36.5 million for the year ending June 30, 2003. From that, the VIT should provide a cash payment of $30.3 million to the VPA for FY 04.[575]

As of June 30, 2002, the VPA had $194.1 million in long-term debt. Terminal revenues and an insurance policy back some bonds. In addition, the Commonwealth has backed 1996 and 1998 bond issues with a sum sufficient appropriation.[576] It appears that bond ratings for the port have decreased from 2002 to today.[577] *USA Today* cites the significant competition between ports on the East Coast that prevent better bond ratings.[578]

This bond revenue is being used to finance significant ($279 million) expansion of the port at the southern portion of the VPA's Norfolk International Terminals.[579] The breakdown of this project is $131 million (2002 bond issue), $50 million (May 2003 bond issue), $50 million (Commonwealth Port Fund Bonds, July 2004), and $48 million (pay as you go).

Further, the port is preparing for the future by drafting plans for 2030 and 2040. Capital improvements total about $2.7 billion, primarily to create a new port facility on Craney Island.[580] It also appears that the VPA relies on the PILOT program, which is a federal program that helps "offset losses in property taxes due to nontaxable Federal lands within their boundaries."[581]

In addition, there has been discussion of the VPA subsidizing rail service to the port.[582]

Virginia Department of Rail and Public Transportation

The DRPT reports to Virginia's secretary of transportation and is subject to the policy oversight of the CTB.[583] Its director, who is appointed by the governor and serves at his or her pleasure, serves as a non-voting, ex-officio member of the CTB as well as on "any committee dealing with passenger and freight rail, transportation demand management, ridesharing, and public transportation issues."[584] The director of the DRPT is also vested with the authority "to do all acts necessary or convenient for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation."[585]

The DRPT has the following general powers: "to accept grants from the United States government and its agencies and instrumentalities"; "to make and enter into all contracts necessary or incidental to the performance of its duties"; "to assist other entities, public or private, in the implementation and improvement of passenger and freight rail, transportation demand management, ridesharing, and public transportation services and the retention of rail corridors for public purposes"; "to represent and promote the Commonwealth's interests in passenger and freight rail"; and "by any means whatsoever, to lease, improve, and construct rail" that are determined to be for the public good.[586]

The enabling legislation does not explicitly grant the DRPT bonding powers. As stated previously, however, it does vest it with the power to acquire rail lines "by any means whatsoever."[587] Further, as was also stated, the director is empowered to "do all acts necessary or convenient for establishing, maintaining, improving, and promoting . . . passenger and freight

rail transportation."[588] Thus, while the enabling legislation does not explicitly grant the DRPT bonding authority, these provisions possibly could be read to support such a power even without an amendment to the DRPT's powers. It is more likely, however, that the General Assembly would have to grant the DRPT bonding power.

In addition to its powers, the DRPT is also charged with various responsibilities. These responsibilities are to "[d]etermine present and future needs for . . . public transportation . . . and the retention, improvement, and addition of passenger and freight rail transportation"; to "[f]ormulate and implement plans and programs for the establishment, improvement, development and coordination of public transportation . . . and the retention and improvement of passenger and freight rail transportation services and corridors in the Commonwealth"; to [c]oordinate with the Department of Transportation in the conduct of research, policy analysis, and planning for rail and public transportation modes"; to [d]evelop uniform financial and operating data and criteria for evaluating public transportation activities"; to [p]rovide training and other technical support services to transportation operators"; to [m]aintain liaison with state, local, district and federal agencies or other entities"; to [r]eceive, administer and allocate all planning, operating, capital, and any other grant programs"; to [a]dminister all state grants for public transportation, rail transportation, ridesharing, and transportation demand management purposes" to "promote the use of public transportation . . . and passenger and freight rail services"; to [r]epresent the Commonwealth on local, regional and national agencies . . . having responsibility for passenger and freight rail"; to [r]epresent the Commonwealth's interests in passenger and freight rail"; to [c]oordinate with the State Corporation Commission on all matters dealing with rail safety inspections and rail regulations which fall within its purview"; to "prepare and review state legislation and Commonwealth recommendations on federal legislation and regulations as directed by the Secretary of Transportation"; and to "[p]romote public transportation, ridesharing, and passenger and freight rail safety."[589]

The FY 04 budget is $240.2 million. Over half, $125.4 million, derives from the Transportation Trust fund with the majority of that money from the 1986 Special session revenue. The federal government provides a further $63.3 million. The remainder of the revenue comes from miscellaneous sources such as transfers from VDOT from the Dulles Toll Road and from the Highway Maintenance and Operating Fund. There are no independent sources of revenue, although, in 2002-2003, there was $5 million in revenue from the Northern Virginia Transportation District Bonds however there were no NVTD Bonds allocated for DRPT in 2004 nor have there been any general funds allocated to the DRPT since $14.7 million in FY 02.[590]

This revenue will be distributed primarily to Mass Transit projects ($224.3 million); $11 million goes to rail assistance. The General Administration budget has decreased from $1.4 million last year. Thus for FY 04, the DRPT has allocated 94 percent of its funds to Mass Transit Assistance, 5 percent to Rail Assistance, and 1 percent to Administrative and Ground Transportation Planning.[591]

The funding source for the rail programs is the Highway Construction Fund and the Virginia Transportation Act of 2000 (high-speed rail, Virginia Railway Express Service capital). The DRPT has increased its FRA funding from $0.627 million to $0.825 million while state funding for Rail Assistance decreased $0.150 million from FY03 to FY 04.

Virginia Resources Authority

The VRA is a political subdivision of the Commonwealth of Virginia [592] that is granted "all powers necessary or appropriate to carry out and effectuate its purposes."[593] Those powers include the power to "have perpetual succession as public body corporate"; "adopt, amend and repeal bylaws, and rules and regulations"; "sue and to be sued"; "have an official seal and to alter it at will"; "maintain an office"; "make and execute contracts"; "sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any of its properties and assets; "employ officers, employees" and other advisors, including lawyers, financial consultants and engineers; "procure insurance"; "procure credit enhancements"; apply for and accept grants or contributions to carry out its purposes; enter into agreements with any agency or instrumentality of the Commonwealth, the federal government or the District of Columbia; invest or reinvest its funds; "establish and revise, amend and repeal, and to charge and collect, fees and charges"; and to "do any act necessary or convenient to the exercise of the powers granted or reasonably implied by this chapter."[594]

The VRA also has the power to borrow money and to issue bonds in amounts it determines to be "necessary or convenient to provide funds to carry out its purposes and powers" [595] and "to pledge any revenue or funds under the control of the Authority to the payment of its bonds or credit enhancements."[596] Such bonds are not backed by the full faith and credit of the state or another political subdivision but are payable only from "revenue, money, or property of the Authority."[597] Each bond will carry a statement on its face to this effect.[598] However, the Commonwealth may make grants of money or property to the VRA "for the purpose of enabling it to carry out its corporate purposes and for the exercise of its powers."[599] It may also issue refunding bonds.[600]

The VRA has the power to borrow money and issue bonds in the amount it determines to be necessary except that the "total outstanding aggregate principal amount of bonds issued by the Authority and local obligations guaranteed by the Authority pursuant to credit enhancements . . . shall not exceed the sum of $900 million without prior approval of the General Assembly."[601] Further, "the Authority shall not exceed the sum of eight million dollars in the total principal amount of bonds outstanding at any one time for the purpose of financing any heavy rail transportation facilities."[602]

Bonds issued by the VRA "shall be authorized by a resolution of the Board of Directors."[603] They "shall bear the date or dates and mature at the time or times that the resolution provides, except that no bond shall mature more than fifty years from its date of issue."[604] The denomination of the bonds, the method and place or places of repayment, the rate of interest, and the date of repayment are determined by the VRA.[605] Bonds may be sold "at public or private sale at the price or prices that the Authority determines and approves."[606]

"Bonds may be secured by a trust indenture between the VRA and a corporate trustee," the terms of which are specified at 62.1-209B.[607]

The VRA serves as a broker for various governments and agencies in Virginia for financing opportunities. It uses techniques such as pooling small bond issues into larger bond issues to capture better interest rates and setting up revolving funds that are loaned at no interest

for capital projects in certain areas (such as airports) and repaid and loaned again. It also uses stand-alone bond issues. It receives capitalization funds from the U.S. Environmental Protection Agency that match state contributions for two revolving funds. These revolving funds are self-perpetuating because the loan payments and interest payments work to restore the funds.

For the fiscal year ended 2002, total assets under the VRA control grew by 10 percent. For the fiscal year ended 2001, salaries for the staff of the VRA were $0.836 million and professional fees were $0.137 million. General operating expenses totaled $0.404 million. These increased to $0.839, $0.191, and $0.425 million in 2002.

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[299] Ibid., 4.

[300] Ibid., 4.

[301] Ibid., 5.

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[303] Ibid., 4.

[304] Ibid., 6.

[305] Ibid., 6.

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[308] Ibid., 6.

[309] Ibid., 9.

[310] Ibid., 6.

[311] Ibid., 10.

[312] Ibid.

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[314] Ibid., 9.

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[318] Fla. Const. Art. X, Section 19.

[319] Fla. Stat. Ann. 341.821.3.d (West 2003).

[320] Fla. Stat. Ann. 341.821.2.a.1 (West 2003).

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[564] Va. Code Ann. 62.1-141 (Michie 2003).

[565] Va. Code Ann. 62.1-142 (Michie 2003).

[566] Va. Code Ann. 62.1-143 (Michie 2003).

[567] Va. Code Ann. 62.1-144 (Michie 2003).

[568] Va. Code Ann. 62.1-146 (Michie 2003).

[569] Va. Code Ann. 62.1-147.2 (Michie 2003).

[570] USA Today, 4 June 2003 (Michie 2003).

[571] Letter from John G. Milliken to the Authority, 28 January 2003.

[572] Ibid.

[573] Office of Transportation, 2002 B-180.

[574] Ibid. at B-177.

[575] Virginia Port Authority, Board Minutes, 2 May 2003, 6.

[576] Virginia Port Authority, 2002 Annual Financial Report, 7).

[577] *USA Today*, 4 June 2003.

[578] Ibid.

[579] Virginia Port Authority, Board Minutes, 28 January 2003, 6.

[580] Virginia Port Authority, Board Minutes, 25 March 2003, 3.

[581] www.blm.gov/pilt/; Virginia Port Authority, Board Minutes, 25 March 2003, 3.

[582] Virginia Port Authority, Board Minutes, 25 March 2003, 3.

[583] Va. Code Ann. 33.1-391.1 (Michie 2003).

[584] Va. Code Ann. 33.1-391.2 (Michie 2003).

[585] Va. Code Ann. 33.1-391.3 (Michie 2003).

[586] Va. Code Ann. 33.1-391.4.1-5 (Michie 2003).

[587] Va. Code Ann. 33.1-391.4.5 (Michie 2003).

[588] Va. Code Ann. 33.1-391.3 (Michie 2003).

[589] Va. Code Ann. 33.1-391.5.1-14 (Michie 2003).

[590] DRPT, Annual Budget 2003-4, 5, 7.

[591] Ibid., 6.

[592] Va. Code Ann. 62.1-203.1 (Michie 2003).

[593] Va. Code Ann. 62.1-203 (Michie 2003).

[594] Va. Code Ann. 62.1-203.2-19 (Michie 2003).

[595] Va. Code Ann. 62.1-206 (Michie 2003).

[596] Va. Code Ann. 62.1-207 (Michie 2003).

[597] Va. Code Ann. 62.1-207 (Michie 2003).

[598] Va. Code Ann. 62.1-217 (Michie 2003).

[599] Va. Code Ann. 62.1-205 (Michie 2003).

[600] Va. Code Ann. 62.1-204 (Michie 2003).

[601] Va. Code Ann. 62.1-204 (Michie 2003).

[602] Va. Code Ann. 62.1-208 (A) (Michie 2003).

[603] Va. Code Ann. 62.1-208 (B) (Michie 2003).

[604] Va. Code Ann. 62.1-208 (B) (Michie 2003).

[605] Va. Code Ann. 62.1-208 (B) (Michie 2003).

[606] Va. Code Ann. 62.1-209 (A-B) (Michie 2003).

[607] Va. Code Ann. 62.1-209 (A-B) (Michie 2003).

APPENDIX D

LEGAL MEMORANDUM ON THE CONSTITUTIONAL ISSUES

Introduction

The question presented is whether it is constitutionally permissible for the Virginia General Assembly to create a public authority to fund improvements to privately owned rail lines. Such public funding is likely constitutional if the state does not pledge its full faith and credit to the authority's bonds or contribute public funds directly to the authority. Should the state do either of these things, however, a court could find the arrangement violates the state constitution. In particular, if the railroads retain ownership of the rail lines improved with public moneys, there is a risk that the courts could find such contributions unconstitutional.

The Virginia Supreme Court has held that the state can create a public authority so long as it meets two conditions. First, the authority must serve primarily a public purpose. *Fairfax County Development Authority v. Coyner,* 207 Va. 351, 355-7 (Va. 1966); *see also Rudee Inlet Auth. v. Bastian,* 206 Va. 906, 909 (Va. 1966). Second, the state, in creating the authority, cannot exceed the limits placed on it by the Constitution of Virginia. *Coyner,* 207 Va. at 355-7; *see also Bastian,* 206 Va. 906.

Public Purpose

It is likely that a court would find that the creation of this authority serves a public purpose provided that the General Assembly declares that it does in fact serve such a purpose.

In determining whether or not an authority serves a public purpose, the courts will defer to the General Assembly's determination that an authority serves a public purpose unless, in the court's judgment, that determination bears no reasonable relationship to the public interest. *See Coyner*, 207 Va. at 357. Under this standard, reasonable doubt must be resolved in favor of the General Assembly's determination. *Id.;* see also *Shenandoah Lime Co. v. Governor,* 115 Va. 865, 867-8 (1914).

Coyner involved the creation of industrial development authorities that would finance and construct facilities to be leased to private companies. The court held that this was reasonably related to the public interest and welfare insofar as they would stimulate and promote "industrial development, which would contribute to the economy of the State and create jobs for its people." *Coyner, 207 Va. at 358*. Similarly, the Virginia Supreme Court has held "the development and operation of produce markets, harbor and port facilities, and marinas for public use were for a public purpose and a proper government function." *Id.*

In light of the Virginia Supreme Court's previous pronouncements, it is likely that a court would find the creation of a rail authority to be reasonably related to the public interest. The enabling legislation makes clear that the proposed authority would finance the improvement of rail lines not as an end in and of itself. Rather, it would do so in order to make rail transportation

more economically feasible and thereby divert freight and passenger traffic off of the Commonwealth's roads and on to its rail lines. This, in turn, will reduce pollution and traffic, make the roads safer for motorists, and lead to decreased wear and tear on the state's roads—all of which are public benefits.

This relationship is reasonable: if trains can travel more quickly over rails, then more businesses—especially those to whom truck transportation was only marginally more efficient than rail transportation beforehand—might choose to transport their goods over rail lines. And as each of those trucks leave the roads, the state will have to spend correspondingly less money on upkeep of those roads and traffic and pollution will decrease. In addition, with fewer trucks on the roads, those roads will become safer for the remaining drivers.

While there may be alternative means to achieve the state's aims, the availability of alternatives is beyond the purview of judicial review. A court, in answering this question, does not put itself in the role of policy maker. Rather, its task is to ask only if the state's end and means are reasonably—not perfectly—related. *See id.* at 357. In other words, a court would ask itself "*could* the state's plan produce the result it claims that it will produce?" Thus, in *Coyner*, the court did not engage in an analysis of the state's plan to spur economic development as compared to other possible policy choices. *See id.* The sole question was whether the state's ends—economic development—were reasonably related to its means—the creation of an authority. *See id.* Accordingly, a court considering the question at hand would undertake the same analysis and, in all likelihood, reach the same result. The fact that in doing so the court would resolve every reasonable doubt in favor of the reasonableness of the state's plan, *see id.,* only serves to bolster this conclusion.

Constitutional Limitations

The second condition of the test—that the state cannot exceed the limits of the constitution—turns on a consideration of three clauses of the state constitution: (1) the credit clause, (2) the stock or obligations clause, and (3) the internal improvements clause.

In examining the constitutionality of an act by the General Assembly, the Virginia Supreme Court has held that every reasonable doubt should be resolved in favor of the constitutionality of that act [*Almond v. Gilmer,* 188 Va. 822 (Va. 1949)], and that the "power of the State is not paramount to the Constitution, but its free exercise is never interfered with unless *plainly* in conflict with the higher law." *Shenandoah,* 115 Va. at 874 (citations omitted) (emphasis added).

The Credit Clause

All uses of public money must comport with the credit clause of the Constitution of Virginia, which states in relevant part: "[n]either the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or

pretense whatsoever, granted to or in aid of any person, association, or corporation…." Va. Const. art. X, § 10.

The Virginia Supreme Court, in interpreting this clause, has held that if the state does not pledge its full faith and credit to the bonds of the authority, then it will not violate the credit clause. *See Harrison v. Day,* page 6. Thus, so long as the state chooses not to pledge its full faith and credit to the authority's bonds, this clause would not be implicated and therefore would not apply to any act taken by the General Assembly.

Even if the state chooses to pledge its full faith and credit, however, it is still likely that this would not violate the credit clause because of the public purpose doctrine. In interpreting the credit clause, the Virginia Supreme Court has repeatedly held that public money, including bonds issued by public authorities and backed by the full faith and credit of the state, can be used in a way that will benefit a private company if such use satisfies the "public (or animating) purpose doctrine." The Court set out that doctrine in *Almond v. Day:*

> When the underlying and activating purpose of the transaction and the financial obligation incurred are for the *State's benefit*, there is no lending of its credit even though it may have expended its funds or incurred an obligation that benefits another. *Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or spirit of the "credit clause" prohibition.*

197 Va. 782, 791 (Va. 1956) (emphasis added).

In *City of Charlottesville v. DeHaan*, the Court applied this doctrine to uphold a financing scheme in which the city issued bonds and then turned over the proceeds to a previously created authority. The authority then lent the money to a private developer in order to finance new construction that would rejuvenate a blighted area of the city.[1] The court found the city's animating purposes to be the redevelopment of the blighted area and "to provide jobs, more tax revenues and other benefits for its citizens." 228 Va. 578, 588 (Va. 1984). Any benefit to the developer was therefore incidental and "incidental benefits to private entities do not make unconstitutional efforts by governmental entities to serve the needs of government." Id. (citing *Harrison v. Day*, 202 Va. 967, 972 (Va. 1961)). *See also Fairfax County v. County Executive,* 210 Va. 253 (Va. 1969) (upholding a locality's guarantee of debts of a metropolitan transit authority because that guarantee served a valid public purpose even though bondholders and private contractors operating the transit service also benefited); *Development Auth. v. Conyer,* 207 Va. 351 (upholding an authority's issuance of revenue bonds to finance a facility for lease to private industry based on the legislative finding that promotion of industrial development was for a public purpose); *Holstein v. Wise* 131 Va. 142, 156-8 (Va. 1921) (upholding an arrangement whereby the county guaranteed payment to a private company for crushed stone to be used by

[1] While *DeHaan* deals with the actions of a city and the present case deals with the actions of a state, for purposes of the credit clause both are subject to its constraints and therefore the analysis is the same for both. *See* Va. Const. art. X, § 10: "[n]either the credit of the *Commonwealth* nor of any county, *city*, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation…." (emphasis added).

private contractors in completing a county road work project because the arrangement was for the benefit of the county and not the private contractor).

Applying *DeHaan* to the instant case, it is likely that the court would hold that the General Assembly has not exceeded its constitutional limits. In the case at hand, as in *DeHaan*, the state's express goal is to benefit the public even though private parties benefit incidentally as well. Thus, it is likely that a court would find, as in *DeHaan,* that the arrangement does not violate the credit clause. The fact that any residual doubt would be resolved in favor of the constitutionality of the act makes this outcome more likely. *See Almond v. Gilmer,* 188 Va. 822.

This case, however, could be distinguished from prior rulings if the rail lines remain privately-owned. While the Virginia Supreme Court has never ruled on a case where public funds were used to benefit privately owned land, it has made statements to the effect that this arrangement would be impermissible. In *Button*, the Court said that they would not have approved a financing scheme in which, as here, the public did not own the "facilities upon which public funds were to be expended." 208 Va. 494, 504 (Va. 1968). Similarly, in *DeHaan*, the court responded to the trial court's concern that public money was to be invested in a privately-owned facility by saying that the authority retained ownership of the land and leased it to the developer and, furthermore, that the authority also retained other controls over operation of the facility by contract. *DeHaan*, 228 Va. at 590. These facts, however, are not present here since the proposed authority would own neither the land nor the facilities in question.

Whether or not this would be fatal to the authority is difficult to predict. On the one hand, this may be fatal to any financing scheme in which the railroad companies maintain ownership of the property and public funds are used to pay for improvements. All of the courts that have invoked the public purpose doctrine to uphold the use of public money for the incidental benefit of private parties dealt with factual situations in which the land in question was publicly owned. It is unclear that these holdings could be used to support the present facts. Indeed, given *Button* and *DeHaan*, a court could find that public ownership of the land in question is a necessary precondition for the public purpose doctrine to apply.

On the other hand, however, neither *Button* nor *DeHaan* foreclose extending the public purpose doctrine to the facts at hand. First, in both cases, the judicial language in question was not part of the holding of the case and therefore could be disregarded as dicta by a court. Second, each case may be distinguishable. *Button* states that there was "no previous instance" in which the court applied the public purpose doctrine to uphold use of public funds when the land in question was not publicly owned. 208 Va. at 504. The court did not decide that the public purpose doctrine could not apply to privately owned land; it only stated that it never had. Similarly, in *DeHaan*, when the court noted that the city would retain ownership of the land as well as certain contractual controls over the facility, it was responding to the lower court's ruling that the proceeds of the bonds were to be invested in a privately owned facility. *DeHaan*, 228 Va. at 590. While this dicta might imply the necessity of public ownership for the public purpose doctrine to apply, it is also plausible that the court sought only to correct the lower court's mistake of the facts of the case and, especially in light of the ambiguity present in *Button*, add another factor in support of its decision without deciding that such a factor was a necessary precondition.

The Attorney General's office has opined that if the Commonwealth retains ownership in fee simple of the track and facilities constructed with public funds, then the state can use public funds to benefit privately owned land without violating the credit clause. *See* 1981-1982 Op. Atty Gen. Va. 97, Sept. 11, 1981. This, however, has never been decided upon by a court of law in the state of Virginia. Thus, while it is possible that a court would agree with the Attorney General's opinion, it is also possible that it would not.

The Stock or Obligations Clause

The stock or obligations clause states that the Commonwealth shall not "subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work." Va. Const. art 10, § 10. This clause is only implicated if the state either contributes money directly or pledges its full faith and credit to the authority's bonds.

The courts have analyzed the stock and obligations clause under the public purpose test. See *Coyner*, 207 Va. at 359, Harrison, 200 Va. at 753, *Almond*, 197 Va. at 792. Thus, in *Almond*, the Virginia Supreme Court held that a law allowing the state to purchase corporate securities to fund its retirement system did not violate the stock or obligations clause because such purchases would be for the benefit of the state and not for the purpose of aiding in the construction and maintenance of the works of a private company. 197 Va. at 792. The legislature's motivating purpose, the court continued, "is the vital and controlling factor" by which the validity of the act should be determined. *Id*.

Turning to the facts at hand, a court could find that the state's investment in rail improvements to private rail lines is permissible under the public purpose test. Just as in the proposed purchase of private securities in *Almond*, the state's investment in private rail improvement would be to the benefit of a private corporation. The motivating purpose of this act, however, is to reduce traffic, improve safety, and reduce emissions on public highways. In light of the public purpose doctrine, therefore, the court could rule, as it did in Almond, that the private benefit is irrelevant when, as here, the motivating purpose of the act was to benefit the public.

Nevertheless, a court could also find that the act violates the stock and obligations clause. While courts afford legislative acts the presumption of constitutionality and will only strike down a law if it "plainly exceeds constitutional limitations," they have also held that "[i]f the Constitution says something is not a proper government function, no amount of legislative language can make it so." *Button*, 208 Va. at 503. Thus, in *Button*, the court held an act by the General Assembly creating an authority that would guarantee the loans of corporations for the purpose of economic development violated the constitution (in this case the credit clause) because the act in question was specifically what the constitution forbids (to lend the credit of the commonwealth to a private corporation). *Id.* This was true, the court said, even though it was clear that the motivating purpose of the act was to benefit the public. See *id*.

Applied here, a court could say that what the General Assembly intends to do—provide funds to private railroad corporations to improve and maintain their rail lines—is, as in *Button*, exactly what the Constitution literally forbids insofar as the state is becoming interested in the stock or obligations of a company "for the purpose of aiding in the construction or maintenance," Va. Const. art 10, § 10, of the company's work. Drawing on *Button*, it could hold that it is immaterial that the state is aiding in the construction and maintenance of those rail lines in order to serve a public purpose because the legislature is attempting to do something that is explicitly forbidden so the public purpose test does not apply. It could also distinguish *Almond* on the grounds that in that case, while the state did invest in the stock of companies, it did not do so "for the purpose of aiding in the construction or maintenance of its work," Va. Const. art 10, § 10, whereas, in the case at hand, the state is looking to achieve its purposes by aiding in the construction and maintenance of the railroad companies' rail lines.

The Internal Improvements Clause

The creation of this authority is probably constitutional under the internal improvements clause insofar as the terms of this clause apply only to the Commonwealth and thus do not restrict the activities of an authority. Thus, the state would not, in creating such an authority, exceed the limits of the constitution. Further, even if the Commonwealth itself seeks to provide funding to the authority directly, this too would probably be permissible under the internal improvements clause.

An act creating an independent public authority would not exceed the constitutional limitations of the internal improvements clause because the authority itself would not be subject to the clause. The clause provides that "the *Commonwealth* [shall not] become a party to or become interested in any work of internal improvement, except public roads and public parks or engage in carrying on any such work…" Va. Const. art. X, § 10 (emphasis added). Thus, by the terms of the constitution, the prohibitions of the internal improvements clause apply only to the Commonwealth itself and not to other units of government. See *Norfolk Federation of Business Districts v. HUD* 932 F. Supp. 730, 746 (E.D.Va. 1996). In *Norfolk*, the court, applying Virginia law, ruled that the prohibitions of the internal improvements clause applied to neither the City of Norfolk nor a public authority—the Norfolk Redevelopment and Housing Authority—since neither entity was the Commonwealth. *Id.* Similarly, according to Senator Edwards (personal conversation), the proposed rail authority will not implicate the internal improvements clause because, like the Norfolk Redevelopment and Housing Authority, it will be a political subdivision of the state and not the state itself. Thus, as in *Norfolk*, the authority itself would not fall within the purview of the internal improvements clause.

Even if the Commonwealth should seek to provide funds to the authority to fund improvements, a court could find that this does not violate the internal improvements clause. The courts have articulated an exception to the internal improvements clause known as the governmental functions exception: if the state's involvement in internal improvements is "incidental and necessary to the performance" of the state's governmental functions, then those activities do not violate the internal improvements clause. *Almond v. Day*, 199 Va. 1, 7 (Va. 1957). In applying the exception, the courts have made clear that they will not pass judgment on

the wisdom of the manner in which the government exercises its governmental functions but rather will only decide if the state's objective is constitutionally permissible. *See Almond v. Day,* 199 Va. at 9; *see also Shenandoah Lime,* 115 Va. at 872-3.

Thus, in *Almond*, the court held that the state's objective of providing bus service to pedestrians through a tunnel connecting two highways was necessary and incidental to the state's governmental function of operating and maintaining the state's highways. Otherwise, pedestrians would have no means by which to pass through the tunnel. 199 Va. at 9. At the same time, however, the court declined to pass judgment on how the state chose to exercise that power (at issue was whether or not the task was best performed by the state itself or by a private corporation). *Id.*

Turning to the facts at hand, the courts have recognized repeatedly that the maintenance and operation of the state's highways is a government function. *See id.* at 8; *Almond v. Gilmer,* 188 Va. at 836. The only question that would remain, then, would be if the state's proposed activities are incidental and necessary to that task.

It is likely that a court would find as such. As the state has made clear, it plans to finance improvements to private rail lines in order to reduce the money spent on highway construction and repair, relieve congestion, improve safety, and avoid pollution. That is a plausible story and, considering that every reasonable doubt must be resolved in favor of the General Assembly's determination, *see Coyner* 207 Va. at 357, one that the courts would accept. This finding is bolstered by the fact that courts have made clear that they will only pass judgment on whether or not the action in question is incidental to a government function and not on how the General Assembly chooses to exercise that function, *see id.; see also, Shenandoah Lime,* 115 Va. at 872-3.

There might be some concern that that state's plan would violate the internal improvements clause because state involvement in railroads is included in the commonly accepted definition of internal improvements for purposes of the internal improvements clause. [In *Shenandoah,* the court first articulated the commonly accepted meaning of internal improvement to be "the channels of trade and commerce, such as turnpikes, canals, *railroads*, telegraph lines, including in more recent years telephone lines, and other works of a like quasi public character." 115 Va. at 872 (emphasis added).] This should not be fatal to the state's plan, however, as the Virginia Supreme Court has held that the governmental functions exception applies even when the activity in question is part of the commonly accepted definition of internal improvements. In *Almond*, the court assumed without deciding that the state's plan to operate a bus service through the tunnel was, in general, prohibited by the internal improvements clause. 199 Va. at 8. Yet despite this assumption, the court nevertheless held that it did not violate the internal improvements clause since the state undertook it in furtherance of a governmental function and there was nothing in the court's previous decisions "to indicate that the State may not engage in the transportation of passengers if that be necessary and incidental to the performance of a government function." *Id*. at 8-9. Thus, by implication, the *Almond* court's holding stands for the proposition that the governmental function exception to the internal improvements clause applies even when the internal improvement in question is part of the judicially defined meaning of the term. Therefore, even though the improvement of railroads, as

is proposed here, falls under the commonly accepted definition of internal improvements, a finding that this was necessary and incidental to the proper government function of maintaining the roads would, as in *Almond*, save this arrangement from the internal improvements clause.

Conclusion

It is likely that the state's plan would withstand constitutional scrutiny if the state neither pledges its own funds to the authority nor backs the authority's obligations with the state's full faith and credit. Should the state decide to take either of these actions, however, then this would be a much closer question, particularly if the railroads retain ownership of the rail lines in question.

APPENDIX E

SOME CONSIDERATIONS CONCERNING THE STRUCTURE OF THE NEW AUTHORITY

1) The Board
    a. Power
    b. Number
    c. Term lengths
    d. Staggered terms
    e. Oath/bond
    f. Voting process
    g. Quorum to meet/minimum number of votes for any action
    h. Chair/other positions/responsibilities: when/how elected, term length (annual or other?)
    i. Compensation: amounts/limits/expenses
    j. Who names?
    k. Qualifications/considerations
    l. Oversight of board: legislative/DOT?
        i. Performance indicators
        ii. Reports
        iii. Legislative pre-approval
        iv. Audit
            1. When?
            2. Who pays?
            3. What is included?
        v. Prioritization of projects
    m. Board's oversight of operations/ceding of power to executive director
    n. Removal
    o. Appointment for vacancies
    p. Term limits
    q. Mandatory meetings?
2) Executive Director
    a. Powers
    b. Relationship to board (Serve at pleasure?)
    c. Can he or she be a member of the board?
    d. Compensation? Control over hiring (board approval)
    e. What does he have? What does the board have to cede to him or her?
3) Administration
    a. Employees (Hire employees or use DOT's employees?)
        i. Terms and conditions: Created by board?
        ii. Grievance process
        iii. Insurance/retirement/other benefits
        iv. Ensure compliance with employment law
    b. Who pays?
    c. Number?

d. Who can name?

4) Powers/duties
    a. General
        i. Sue and be sued
        ii. Make contracts
        iii. Adopt and use a common seal, and alter such seal at its pleasure
        iv. Adopt, alter, repeal bylaws
        v. Necessary and convenient clause
    b. Main office/other offices
    c. Keep records
    d. Employees: Appoint, employ, dismiss, fix and pay compensation, determine duties
        i. Legal counsel/advisors/consultants/engineers/accountants/financial advisors/technical advisors/officers/advisors
        ii. Citizenship required?
        iii. Retain legal counsel with approval of Attorney General for cases? Use Attorney General?
    e. Planning
        i. Process?
        ii. Legislative oversight?
    f. Police force? Police officers? Jurisdiction?
    g. Police powers? Security force?
    h. Fire?
    i. Fiscal year
    j. Bonding/borrowing
        i. Full faith and credit
        ii. Special fund doctrine
        iii. State proprietary interest: *Useful life* as a criterion?
        iv. Refunding bonds (process?)
        v. Limits
        vi. Inform legislature? Sinking fund
        vii. Remedies of bondholders
        viii. Trust funds? Bonds as legal investments?
        ix. Temporary bonds? What is the process?
        x. Bonds between legislative sessions? Process?
        xi. What is stated on the bonds?
    k. Acquire land: Acquire, construct, maintain, equip, repair, rent, own, lease, buy, mortgage
    l. Publications
    m. Invest funds
    n. Insurance
    o. Public hearings: Process/significance
    p. Eminent domain?
    q. Rates/rental value/tolls/charges, etc.
    r. Design/construction/maintenance/engineering/studies
    s. State appropriations
    t. Tax status

u. Enter into agreements with state/political subdivisions/federal government/federal agencies?
v. Local authorities subordinate?
w. Apply for/receive grants/loans/gifts?
x. Accept/buy/donate/dispose of land?
y. Operate?
z. Criteria for selecting/operating? Who decides? Who sets what criteria?
aa. Procurement of goods: Public Procurement Act (exempt?)
bb. Virginia Personnel Act (exempt?)
cc. State Corporation Commission
dd. Treasury?
ee. Other state laws (i.e., Conflict of Interests Act)
ff. Definitions
gg. Declare it an essential government function/public purpose?
hh. Liberal construction?
ii. Who has title to property?